No. 590.

Brf. of Kruttschnitt, for

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 590.

NEW ORLEANS WATER WORKS COMPANY,
PLAINTIFF IN ERROR,

vs.

STATE OF LOUISIANA ET AL.,
DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS OR AFFIRM.

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SUPREME COURT OF THE UNITED STATES.

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No. 690

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PLAINTIFF IN ERROR,

versus

STATE OF LOUISIANA ET AL.,
DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS OR AFFIRM.

STATEMENT OF THE CASE.

The State of Louisiana appearing through her Attorney General alleges in her petition in this case that a joint committee of the Senate and House of Representatives of the State investigated the affairs of the New Orleans Water Works Company and that after such investigation the General Assembly referred the matter to the Attorney General to bring suit to forfeit the charter of the Water Works Company, or to take such action as he thought proper; also that the City Council of New Orleans requested him to bring the suit.

That the New Orleans Water Works Company was or-

ganized as a corporation pursuant to Act No. 33 of the Extra Session of 1877, amended by Act No. 43 of 1878, both statutes being made a part of the petition, and both being printed in the Appendix to this brief.

That the first and chief obligation of the New Orleans Water Works Company was to furnish the inhabitants of New Orleans with an adequate supply of pure water for all purposes; that although it had been in operation more than twenty years, it had never complied with this obligation, but had only furnished an insufficient and very inadequate supply of very muddy water; that the muddy and impure water furnished has been wholly inadequate to extinguish fires, wash the yards, alleys and streets, and supply the inhabitants with water for bathing and domestic purposes, and that at no time was the water furnished fit for drinking or cooking; that it was the duty of the Company, six months after its organization in March, 1878, to proceed to the erection of new works and pipes sufficient to furnish a full and adequate supply of water, and year by year to complete the same so as to give an adequate supply of water to the people of New Orleans; that it has never done this and has thereby forfeited its exclusive privileges as provided in the 17th section of its charter.

That the water mains laid by the New Orleans Water Works are inadequate, and so inadequate that the firemen cannot and could not get water to extinguish fires, and that millions of dollars worth of property have been lost or destroyed in consequence of the derelictions of duty on the part of the Company in not furnishing an adequate supply of water.

That the Company was by the 15th section of its charter prohibited from charging for water supplied by it any more than the rates paid to the City of New Orleans in 1877, the Legislature meaning thereby the rates legally fixed and adopted by the City Council in 1870, which were the only rates legally in force and legally exacted by the City in 1877. That the Company has habitually, from 1878 to the present time, illegally exacted and collected greater rates than those legally exacted by the City for the same quantities of water supplied, or the same facilities and opportunities for drawing water from its pipes.

That it has always been the duty of the New Orleans Water Works Company, as a public corporation, since its organization, to treat all inhabitants alike and to charge and exact from each inhabitant to whom it furnishes water the same sum of money for the same or similar service, and to impartially enforce and collect its legal rates against all, without fear or favor; that it has been guilty of breaches of duty in this respect and has constantly and habitually shown favoritism and charged and exacted higher rates from some than from others for similar services and for the same quantity of water or the same facilities for using water, and has exacted from large and wealthy consumers less in proportion than from small and poorer ones.

Other charges were also made in the petition, which are immaterial at the present time, as they did not receive any attention from the lower court.

The prayer of the petition, in so far as it is material now to refer to the same, is that the charter and all the franchises of the defendant corporation be forfeited, and that it be enjoined from tearing up the public streets and from pur-

suing its business, reserving the right to apply for the appointment of a liquidator to liquidate its affairs.

The answer of the New Orleans Water Works Company to this petition practically negatives all of its averments and contains particularly the following allegations material upon the issue of the jurisdiction of this Court, to-wit:

The defendant Company avers that it is a corporation duly created and existing under the legislative acts referred to in the plaintiff's petition, but that the character, object, purposes and intent of the legislation are not truly set forth in the petition; that the prime, main, and principal object of the legislation was not to provide the City of New Orleans with water works or an installation of works for pumping and providing the City with a public water supply, because, for a period of more than forty years, prior to the date of the legislation, the City of New Orleans had water works for the public supply of water and for municipal and other purposes, and an installation that had been accepted, taken and considered in all things complete and adequate therefor by both the State and City authorities; and that it is not true that the prime and principal object of the legislation was to provide for the enlargement, improvement or expansion of the existing water works at that time owned and operated by the City, which possessed full power and authority to enlarge, expand and improve the same and provide against any inadequacy thereof, without the necessity of any enabling action by the State.

That by virtue and authority of the provisions of the Act of the Legislature approved April 1st, 1833, the Commer-

cial Bank of New Orleans was incorporated with the authority and charged with the duty of providing a water works plant and system for the City of New Orleans; that it complied with that grant and duty by constructing works and operating the same; that the City, acting under provisions contained in the charter of the Company, at the expiration of thirty-five years from the date of the charter, elected to purchase the water works, and the value and price of the same were, pursuant to the terms of the charter, fixed at two million dollars.

That the City being at the time a shareholder in the capital stock of the Commercial Bank to the extent of $500,000, credit to that amount was allowed the City on the price of the property as established by arbitration; that the City was also credited with her interest as a shareholder in a sinking fund held by the Commercial Bank, said interest amounting to the total sum of $106,600, so that the City was entitled to a credit on the price of the water works as fixed by the arbitration of the sum total of $606,600, leaving a balance to be paid by her to the Commercial Bank of $1,393,400, to be paid in City bonds authorized by the Act of 1833.

That the City so purchased the works on the 19th day of January, 1869, issuing her bonds in payment therefor to the full amount of $1,393,400, and that the City remained the owner of the works until the 9th of April, 1878, having full power to enlarge and improve the plant if found inadequate to provide the requisite quantity or quality of water to meet the demands of the City or its inhabitants for all purposes, but that deeming the water works adequate in all respects, the City did not during her owner-

ship increase or improve the efficiency or capacity of the water works plant, but rather diminished the same, allowing the works to become lessened in capacity by decay and dilapidation.

That shortly after the purchase of said property by the City of New Orleans, the five hundred thousand dollars in municipal bonds issued to the Commercial Bank, in payment for its stock subscription to five thousand shares of the capital stock of the bank at the time of its organization in 1833, became due and payable, and were by the City allowed to become dishonored by non-payment, and only one hundred and eleven thousand five hundred dollars in amount thereof were redeemed by the City in any form or by any means prior to the 9th day of April, 1878; that the remainder of said bonds remained outstanding dishonored and unpaid in the hands of *bona fide* holders. At the same time the current matured obligations of the City constituting its floating debt, amounting to several million dollars, were also unpaid and outstanding in the hands of its creditors, the holders thereof clamoring in vain for pay, the City being without revenue or resources adequate to meet and pay the same or its current expenditures involved in the administration of municipal government.

That the City being in the embarrassed financial condition thus set forth, the State Legislature attempted to rescue the City in part from this condition of practical bankruptcy by various devices, one of which was to sell or exchange the City asset, consisting of its public water works, for money or in exchange for the matured obligations of the City to some purchaser who would take the property with such added franchises and rights as would apparently

make the property valuable in the hands of such purchaser.

That to accomplish this end the State Legislature, in order to obtain a possible purchaser, was compelled to provide for the creation of a corporation to provide the aggregation of capital necessary to purchase the water works at the price for which the State offered the same for sale, to-wit., two million dollars, and that at its extra session in 1877, the Legislature adopted Act No. 33 of the acts of that session, referred to in the petition, and tendered said water works property and rights for sale under the terms and conditions of that act; but that the terms of said act were so burdensome, the *ex-officio* power of direction vested in the representatives of the City on the Board of Directors by said act was so great, when added to the City's voting capacity on the stock that it might hold, and the other obligations, features and conditions of the act were so onerous, that no persons could be found willing to avail themselves of the act and create the corporation provided for therein. The State having become satisfied that none would avail themselves of said Act No. 33, adopted at the next session of the Legislature the amendatory Act No. 43, of the Acts of 1878, and again offered the property for sale, together with the rights, privileges, franchises and exemptions conferred in said legislation as amended.

That when Act No. 33, of Extra Session of 1877, had been amended, as aforesaid, by the Act of 1878, persons sufficient in number and amount, of the holders of the City's obligations described in said legislation, were found, who were willing to avail themselves of the offer so made in said legislation, and organize the cor-

poration provided for to purchase the property and rights so offered for sale by the State; that such persons after subscribing stock to the extent of five hundred thousand dollars, and after also surrendering to the City of New Orleans City obligations of the character named in the legislation of 1877 and 1878 to the amount of five hundred thousand dollars, in par value, to be cancelled and held by the City, and, after proceedings as provided by the act, met prior to the 9th day of April, 1878, and in due form organized the corporation provided for as the New Orleans Water Works Company, defendant herein, and immediately, as required by said legislation, made and issued in due form and delivered to the City of New Orleans, certificates of ownership of the twenty thousand shares of stock constituting the entire capital stock of the defendant corporation, conferring the same upon the City of New Orleans in full and complete ownership, not subject to any assessment or demand of the corporation thereon.

That the defendant never received into its treasury one dollar from the amount of its capital stock, the City owning and holding every share thereof, as the stipulated purchase price of the entire Water Works plant and property, including franchises and rights granted by the State and sold with the balance of the property, rights and franchises so offered for sale by the State, amongst which property so sold to, and purchased by, the said defendant for a valuable consideration, was the valuable and indispensable franchise to be a corporation, a right and property not severable in law from the balance of said property included in said sale to this defendant.

That on the 9th day of April, 1878, in order that there

might be authentic evidence of said purchase and sale, the City of New Orleans, as directed by said legislation, by a notarial act passed before Gustave Le Gardeur, Jr., a notary public, in and for the Parish of Orleans, sold and transferred to the New Orleans Water Works Company all of said property, rights, servitudes, privileges and franchises connected with said Water Works and owned by the City in connection therewith, acquired from said Commercial Bank of New Orleans, or from any other source. as well as all the rights, franchises, exclusive privileges and immunities created and named in said Act No. 33, of the Acts of the Extra Session of 1877, and Act 43, of the Acts of 1878, as well as all of the rights, monopolies and franchises granted to the Commercial Bank under and by the provisions of the act, approved April 1st, 1833, incorporating the said Commercial Bank of New Orleans, that had been assigned and accrued to the City under the terms of its purchase of the Water Works from the Commercial Bank and by the terms and covenants contained in said notarial act of transfer of the 19th of January, 1869.

That any holder of any share of the capital stock of the defendant corporation except the City of New Orleans herself holds his shares of stock by title traceable through mesne assignment to the City of New Orleans, the original holder and owner of the entire twenty thousand shares of stock authorized by Act No. 33, of Extra Session, 1877, and that no other shares were ever issued or have ever been in existence.

That the City of New Orleans has sold or exchanged in extinguishment of City obligations all of said twenty thou-

sand shares of stock, excepting thirty-nine hundred and twenty-seven shares, that are as yet not disposed of by sale or exchange for city indebtedness, and that these last mentioned shares were held in the name of the City herself as owner until, in compliance with a judgment rendered by State courts of competent jurisdiction, the said shares of stock standing in the name of the City were transferred to the Board of Liquidation of the City Debt, and have since said transfer been held by that Board for the City as an asset of the City for the extinguishment of its debts, subject to the trust imposed by Act No. 33, aforesaid, and all earnings and dividends thereon have since been paid to the City through said Board of Liquidation.

That the State being well aware that the defendant would not receive a dollar in funds in its treasury from its capital stock, and in order that the funds might be obtained to accomplish that purpose, in section 9 of the said act, conferred power on defendant to borrow money for the purposes therein stated, and with the consent of the City Council secure the payment of bonds issued for that purpose by a mortgage of all the property and franchises of the Company, including its *"franchise to be a corporation,"* specially therein named, as subject to hypothecation.

That the defendant twice availed itself of this right and power to issue its bonds, secured by mortgage of said property, franchises and rights, after first obtaining the permission of the Council of the City of New Orleans so to do.

That the bonds issued and now outstanding under these two mortgages aggregate $645,000.00 in amount, and that the holders of the bonds are indispensable parties to this action, which seeks to destroy the franchise of the corpo-

ration, *and that the plaintiff is acting in bad faith and contrary to the Constitution of the United States in assailing the franchise to be a corporation in manner and form as the same is assailed in this action, and particularly the Fourteenth Amendment to the Constitution, prohibiting a State from depriving any person of life, liberty or property without due process of law, or from denying any person within its jurisdiction the equal protection of the laws, which constitutional guarantees are specially pleaded.*

The defendant further alleged that the grant of corporate life to it was not, as is usually the case, a grant of corporate life for the purpose and consideration only of the establishment of public works or improvements of a public character, where the only consideration passing to the State for the grant of corporate life is some supposed increased general public benefit resulting from the construction and installation of public works; but that, on the contrary, in the case of the defendant corporation, the contract and agreement between the State and the defendant was, and is, an unquestionable contract of bargain and sale of all the property, rights and franchises described in the Acts of 1877 and 1878, for an exact price fixed by the State in its offer of the property for sale, which offer was accepted and price paid by the defendant as the result of a bargaining in which the State was acting not alone in its character as a sovereign, but as a merchant and trader in commerce, and that in the bargaining and sale of the said property and franchises the State must, in law, and by the Courts, be considered a trader engaged in driving a hard commercial bargain in its own interest and on its own terms, for its own benefit and profit.

That it was not the real motive or intent of the State in thus bargaining to benefit the inhabitants of New Orleans by providing for them a water works system and plant, inasmuch as they had for years before that time possessed a public water supply, water works and system. Nor was it the intent of the State in thus bargaining to provide authority to enlarge and improve the then existing Water Works of New Orleans, inasmuch as the City herself had full power to extend, enlarge and improve her Water Works at will without resort to the Legislature for authority. That this was not the case is further demonstrated by the enactment contained in the fifth Section of said amendatory Act of 1878, declaring that the full, complete and adequate supply of water, referred to in the Act of 1877, shall be so construed as to require a supply of water at the height of not less than fifteen (15) feet from the ground wherever the pipes of the Water Works now exist.

That the true and actual intent of the legislation referred to was to sell the property, real, personal and mixed, and all the added rights and franchises contained in said legislation, including the right and "franchise to be a corporation," created in said legislation, as an inseparable entirety and mass, in order to obtain the means and resources from the purchaser thereof to pay or extinguish two million dollars of the public and floating debt of the City of New Orleans; that the "franchise to be a corporation" was a large and extremely valuable portion of the property offered for sale by the State and sold to the defendant, and for which it paid the bargained consideration and price of two million dollars, and that this right to be a corporation cannot lawfully be segregated from the other property

sold, and destroyed, as is sought in this action, the action of the State being in fraud and bad faith, while the State holds and retains the price paid by defendant.

That said contract of bargain and sale is in all respects the same in law as if it had been made and entered into by and between private citizens and traders, trading in this State, and cannot be assailed or recalled by the State, excepting for the same sufficient causes and by the same legal proceedings in the same form as provided by the laws of this State in force at the time when said contract and sale was made, providing for assaults upon and the rescission of like contracts between private citizens or inhabitants of the State, all of which statutes, laws and remedies and procedures in Court, as far as the same affect said contract, are in fact and in law a part of the contract between the State and the defendant, *which is protected from all impairment at the hands of the State by the Constitution of the United States, particularly by Section 10 of Article I, acting on the State of Louisiana as a prohibition, while acting or moving, as plaintiff in this action, in impairment of the faith of its own contract, to the same extent as if such impairment had been attempted through and by means of legislation compassing the same effect and result.*

That if the joint resolution of the State Legislature, referred to in the petition (Act No. 150 of the Acts of 1898), can be or is construed as directing the institution and prosecution of this suit, or as directing the Attorney General of the State, in the name of the State, to institute and prosecute this action, for the purpose and with intent to segregate from the mass of the property sold by the State to the defendant its "franchise to be a corporation," or, if

there exist any other statutes of the State authorizing or directing the Attorney General to that end and purpose, *said joint resolution and statutes are repugnant to the Constitution of the United States, particularly to Section 10 of Article I thereof, which is specially pleaded in defense of this action.*

That in and by Act No. 56, of the Acts of 1884, the State of Louisiana recognized defendant as an existing corporation free from any cause of forfeiture of its corporate life or lawful grounds for the rescission of said contract, bargain and sale with which its corporate life is indissolubly connected and welded, and neither the City of New Orleans nor the State of Louisiana has, at any time, tendered back to defendant the price and consideration that defendant paid for said corporate life and other property, nor the value and cost of any betterment of any of said property by defendant while in possession thereof, nor have either of them in any way offered or attempted to restore defendant to its condition as it existed at the time when it purchased its corporate life and other property as aforesaid, as required by law in the case of rescission of contracts by the law of the State existing and in force at the time when said sale was made, and at all times since that date; nor has either the State or the City of New Orleans in any manner attempted to put defendant in default for any alleged nonperformance of said contract with the State of Louisiana in any lawful manner or form.

That the resolution alleged to have been passed by the City Council of the City of New Orleans directing or requesting the State through its Attorney General to institute this action furnishes no warrant or authority for the institution of the same. That, if said legislation does

warrant the Attorney General in instituting this action and prosecuting the same, *then the resolution is repugnant to Section 10 of Article I of the Constitution of the United States as impairing the force of a contract between the defendant and the State of Louisiana, to which the City of New Orleans was a party.*

The answer further specifically denied all the grounds of forfeiture and prayed that the plaintiff's suit might be dismissed.

Inasmuch as the decision of the Supreme Court of Louisiana forfeiting the charter of the defendant Company was based upon the proposition that the Company from 1883 up to the present time has violated the section of its charter providing that it should charge no more for water furnished by it than was paid by the consumers to the City on March 17th, 1877, and that it has discriminated between citizens and corporations in respect to their water supply, we think it well to here state the portion of the answer containing the defense to these specific charges.

The answer to these charges is found in the fifth paragraph of the answer, and is in substance as follows:

The defendant denies every allegation of the plaintiff's petition on this subject; avers that plaintiff has falsely stated the legal import and meaning of Section 15 of Act No. 33, Extra Session, 1877; that the truth is, that in and by said Section 15, the Legislature of the State conferred upon defendant, through its Board of Directors, legislative power and authority to establish and fix the rate of charges for water sold, subject only to the condition that such rates should not be so high as to yield a net profit of more than ten per cent. per annum on the two million dol-

lars of the capital stock of the defendant corporation, and also provided that the rate of charges for water so fixed should not exceed in amount the rates which the City of New Orleans had the right to charge for a like supply at the time of the adoption of said Act No. 33, Extra Session, 1877.

That the right to establish such water rates, so granted to defendant, was and is the right to legislate on the subject, which right is conferred and expressly delegated by a contract carrying with it all of the legal incidents connected with that power, one of which is the legal presumption of the correct exercise and use thereof by the possessor, not to be overthrown, except by the solemn adjudication of a competent court on an issue properly made and determined.

That the Board of Directors of defendant, consisting of seven members, three of whom have always been officers of the government of the City representing her, have, by virtue of the legislative power vested in said Board of Directors for that purpose, by said Act No. 33, Extra Session of 1877, established and fixed the rate of charge for water furnished to consumers, and that has been charged by defendant, and the presumption of correct legislation by said Board of Directors in that behalf attaches thereto and has never been overthrown or adjudicated against it in any suit by the City or by the State on an issue as to the legality thereof.

That the rate of charges so established has never yielded or produced ten per cent. profit on the capital stock of the defendant corporation at any time, nor has said rate of charges at any time been in excess of the rate that the City

of New Orleans had lawful right to charge and collect at the date of the adoption of Act No. 33, of Extra Session of 1877, for a like supply, with "equal facilities and opportunities for drawing water from its pipes." The truth being that the administration of the water works, while owned and operated by the City, and at the date of the adoption of Act No. 33, was so wretched, and the works in such dilapidation, and the management so reckless, careless and incompetent, through the fault of the City, that it was impossible for her to give and furnish consumers the same quantity of water through the same house and yard fixtures, cocks and valves as defendant has delivered to the same consumers.

That the average pressure on the pipes and mains, whilst the works were owned and operated by the City, never exceeded the pressure exerted by a column of water fifteen feet in height, while under defendant's management it has been equal to the pressure of a column of water from sixty to eighty feet in height, thus furnishing a supply of water to the upper stories and roof tanks of buildings without involving the consumer in the expense of pumping the water, and delivering a largely increased flow and quantity of water from the same openings, valves and cocks as were used when the City owned and operated the works, largely increasing the expense involved in, and incident to, the increased supply and pressure without any increased expense or charge to the consumer.

That, if this was not the case, and if it were true as alleged by the plaintiff, but as is denied, that the charges and water rates, as fixed by defendant, have been higher than the City could lawfully charge when she sold the

works, the fault, if any, is as much the fault of the City as of the defendant, the City not only having participated, through her directors, in the establishment of the rate complained of, but having, at all times, participated in all dividends and earnings accruing to the defendant corporation from such charges and disposed of in dividends accruing to the 3927 shares of capital stock of the corporation, owned and held by the City, from the date of the creation of defendant corporation, and the City having expended the money so received for her own purposes and having never returned or offered to return any part thereof to defendant, whereby both the City and the State stand, and are in law estopped from in any way and for any purpose asserting, as an alleged cause of forfeiture, or complaint in any form, against the defendant, that any unlawful or illegal charge for water has been made or collected and disbursed in dividends by the defendant Company.

That no proceeding for forfeiture of defendant's charter or any of its other property, rights, and franchises, can be lawfully based on any alleged non-compliance with any of the provisions of Section 15 of Act No. 33, at the instance of the State, in this or any other form of proceeding, because Section 15 provides for its own enforcement in the courts by legal proceedings at the suit of the City, with which duty the City stands charged in that section by the command of the State. That it was to enable the City to perform that duty that three of the executive and administrative officers of the City government are made *ex-officio* directors of the defendant corporation, to participate in all legislation establishing water rates, which representation is not to cease even when the City has parted with all of its

shares of the capital stock of defendant corporation. That for the same reason and purpose the City was given the right of visitation by the City Council, through a committee of five councilmen, for the purpose of determining whether the restrictions imposed by Section 15 have been and are observed by the Board of Directors of the corporation, as well as whether there has been any overcharge in water rates, or whether there has been any excess of net earnings from water rates over the limit of net earnings fixed in Section 15. That Section 15 provides a special remedy by judicial proceedings for the adjustment of any difference of opinion between the City authorities and defendant, both as to the rate of water charge or concerning any excess of revenues and net profits arising therefrom, or as to the correctness of the legislation of the Board of Directors of defendant, establishing water rates, by mandamus or other judicial proceedings in the courts.

That by reason of the provisions of said Section 15 of Act No. 33, E. S., 1877, that section provides for its own enforcement, devolving that duty upon the City, acting through the courts by special judicial proceedings, and that no pretended neglect, mistake or failure of duty prescribed in or by Section 15 can be made a lawful ground for an action to forfeit any of the rights or property of defendant by the State until after the defendant has had its day in court at the suit of the City, and has unlawfully neglected, failed or refused to comply with any lawful judgment against it, if adverse to the decision and legislation of its own Board of Directors.

The allegations as to discrimination contained in para-

graph 6 of the petition are all expressly denied by the sixth paragraph of the answer.

The Judge of the District Court of the State before whom the case was tried decided it in favor of the defendant. An appeal was taken to the Supreme Court, where the decision of the lower court was reversed and judgment rendered in favor of the State and againt the defendant, decreeing the forfeiture of the charter and of all the franchises of the defendant.

Whilst the decision is a lengthy one, it is clearly shown that the ground upon which it was rendered was that the Company, from 1883 up to the present time, has grossly, deliberately and persistently violated the provision of its charter, that it should charge no more for the water furnished by it than was paid to the City on March 17th, 1877, and that it has discriminated between citizens and other corporations with respect to their water supply. This is clearly shown by the following quotation from the opinion of the Court:

"It is not claimed that the defendant Company was granted the monopoly in question with its other privileges in derogation of common right entirely without conditions. And if the lawmakers intended that it should enjoy that monopoly and those other privileges, they also intended that it should observe the conditions upon which they were granted. But one of the conditions was that the Company should charge no more for the water furnished by it than was paid to the City upon March 31, 1877. The charter of the Company, under which its monopoly and all other franchises are enjoyed, contains a plain, positive prohibition to that effect. And yet the evidence in this record shows that the Company, from 1883 up to the present time, has grossly, deliberately and persistently violated the prohibition by the establishment and enforcement of a tariff

of charges for water greatly in excess of that thus authorized; and not only so, but whilst enforcing its excessive, unauthorized and illegal charges has unjustly discriminated between citizens and other corporations with respect to their supply of an element and commodity equally necessary to human existence and to human affairs. This violation of the law and of its charter obligations is not one the effect of which is confined to the Company as a business entity, or to the investment of its stockholders. It inures to their pecuniary advantage; but, in its operation, it oppresses, and has oppressed, and will continue, if allowed to continue at all, in perhaps even greater degree, to oppress an absolutely dependent public. In view of these facts, the law demands that the privileges and corporate life thus abused should be withdrawn. And it requires no other law, and no other construction of law, than such as is found in, and authorized by, the Civil Code of this State to reach such a conclusion."

On an application for a rehearing, the Court referred specifically to the plea made by the defendants that a tender by the State to the defendant of the consideration given for the contract was a condition precedent to the right to annul it, and passed upon this proposition as follows:

"The proposition that no decree of forfeiture should be rendered in this case, except upon a tender, by the State, to the defendant, of the bonds which were given by its stockholders in exchange for their stock, appears to us to be untenable. The defendant was established, as private corporations are usually established, by, and for the benefit of, its promoters, who held the bonds of the City of New Orleans, and as a measure of relief which, no doubt, many other creditors of the City would have been glad, at that time, to have had extended to them. The only consideration received by the State for the valuable privileges granted by it was the advantage which it was supposed would inure to a community of her citizens from the faith-

ful discharge by the corporation of the obligations assumed by it, and the corporate and other franchises were granted upon the condition, that, if those obligations were not faithfully discharged, the franchises would be withdrawn. This was, and is, the law of this State, which entered into, and became a condition of, the contract, and the decree of forfeiture is merely the enforcement of that condition."

The defendant has applied for a writ of error to this Court, which writ has been granted, and the defendant assigns error as shown in the Assignment of Errors printed in the Appendix, pp. i-ix.

The State of Louisiana and the City of New Orleans, intervenors and defendants in error, move the Court to dismiss the writ of error on the ground that no question under Revised Statutes, Section 709, was properly raised in or was decided by the Supreme Court of Louisiana; or in the alternative, move the Court to affirm the judgment of the lower court, on the ground that if the record shows that this Court has jurisdiction, it is manifest that the questions on which jurisdiction depends are so frivolous as not to need further argument.

ARGUMENT.

From the foregoing, it will be seen that this case may, in its ultimate analysis, be fairly stated as follows:

The State of Louisiana, appearing through her Attorney General, under authority claimed to be vested in him by an Act of the Legislature of that State passed in 1898, many years subsequently to the incorporation of the New Orleans Water Works Company, filed a suit to forfeit the charter of that Company, upon the allegations, *inter alia*, that the Company was charging a higher rate of compensa-

tion for the water furnished by it to its customers than was authorized by law, and that its charges were not only unauthorized but unjustly discriminative between individuals and corporations with respect to their supply of water.

The answer of the defendant Company not only negatived the existence of these facts, but claimed that Section 15 of the charter gave the Company the right to fix rates subject to the condition that the net profits derived from its business should never exceed 10%, and that the rates should never exceed those paid to the City; that to compel compliance with these terms, visitatorial power was given to the City Council of New Orleans, as also the right by mandamus to compel compliance with these rules; that these were the remedies provided by the charter to enforce correct charges, and that the forfeiture of the charter by reason of incorrect charges was a remedy never contemplated by the charter, and clearly inadmissible in view of the facts of this case.

That those facts are that the State of Louisiana, in order to assist the City of New Orleans to pay a portion of her public debt, organized the Water Works corporation, vested it with large and valuable franchises, authorized the City to transfer property to it, and in exchange for that property to take all the stock of the corporation. That the State further authorized the City to use the stock at par in payment of an equal amount of the City debt, to-wit., $2,000,000 of stock for $2,000,000 of debt.

That specific performance, enforced by a statutory writ of mandamus, was the remedy provided for the enforcement of the charter obligations of the Company as to rates,

and that it was necessarily the only remedy contemplated in view of the peculiar nature of the charter, and in view of the fact that a large sum of money had been paid for the franchises and charter rights, so that to forfeit those franchises without a *restitutio in integrum* would be grossly inequitable and contrary to the general laws of the State of Louisiana, in such cases made and provided. Such a forfeiture would have constituted—not the forfeiture of a unilateral grant, void for condition broken—but a forfeiture of property for which a valuable consideration had been paid, and without any compensation to be made. It would have denied to the corporation the equal protection of the general laws of the State, and would have deprived it of its property, without due process of law, in violation of the 14th Amendment to the Constitution of the United States.

That, if the legislative Act of 1898 (Act No. 150 of 1898, printed in the Appendix, p. xxxii) is to be construed as directing the institution and prosecution of this suit for the purpose and with the intent of segregating from the mass of the property sold by the State to the defendant its franchise to be a corporation, and to forfeit that franchise without previous compensation made, then that statute is repugnant to the Constitution of the United States and particularly to Section 10 of Article 1 thereof, and that the exercise of the power of forfeiture of the franchise of the corporation in manner and form as it has been exercised by the Supreme Court of Louisiana in this case, deprives the corporation of property without due process of law, and denies to it the equal protection of the laws.

The Supreme Court of Louisiana, notwithstanding these defenses, forfeited the charter, and in its opinion on re-

hearing expressly passed upon the proposition that a tender by the State to the defendant of the bonds given by its stockholders in exchange for their stock was not a condition precedent to the right to forfeit the charter. It thus appears that the constitutional defenses were not only urged, but to the above extent expressly passed upon.

The Federal questions which arise in this case are by fifteen assignments of error (Appendix, pp. i *et seq.*) presented to this Court from every point of view. These assignments all substantially present the following questions upon the same facts, to-wit:

(1) The charter of the Water Works Company prescribing mandamus as the remedy to maintain a lawful tariff of water rates, is not the substitution by the writs of forfeiture of charter, as a remedy for the maintenance of unlawful rates, a breach of the contract, and a deprivation of property without due process of law, and a denial of the equal protection of the laws?

(2) If such remedy be sanctioned by, and sought pursuant to a State statute, subsequent in date to the charter of the Water Works Company, does not such statute impair the obligation of the charter contract, divest vested rights, and deny to said Company the equal protection of the laws?

(3) Can the State forfeit such a charter and take back the franchises at the same time that she leaves the corporation in possession of the physical property depleted in value by the loss of the franchise, and at the same time that she keeps the money paid for the property plus the franchise?

(4) The general law of the State providing a *restitutio*

in integrum in all cases where a synallagmatic, commutative contract is dissolved, and the charter containing no special provision taking the State's contract from under general provisions of law, is not a State statute authorizing the Attorney General to institute proceedings to forfeit the contract and take back the franchise, at the same time that the State keeps the consideration paid for the same, a statute impairing the obligations of a contract?

(5) Is not a judicial decision refusing to apply to this contract the general provisions of the law of contracts prevailing in the State, a taking by the State through her judiciary of the property of the defendant corporation without due process of law?

(6) Is not the legislative resolution, the action of the Attorney General, and the action of the Supreme Court of the State, the taking by the State of property without due process of law through the instrumentality of her legislative, her executive and her judicial departments, both jointly and severally?

(7) Is not the refusal to apply to this case the general provisions of the law of contract prevailing in the State of Louisiana a denial to the plaintiff in error of the equal protection of the laws of the State of Louisiana?

The following propositions of law, all material to this cause, have been so clearly laid down by this Court, that we deem it unnecessary to do more than to state them:

(1) The jurisdictiou of this Court is not defeated because the Supreme Court of a State does not in terms pass upon the claim distinctly made there, that the State legislation and the construction which the Supreme Court was asked to give to it was in derogation of rights and privi-

leges secured to appellant by the Constitution of the United States.

Chicago Life Insurance Co. vs. Needles, 113 U. S. 579.

The Court, *loco citato*, says:

> "The Supreme Court of Illinois did not, in terms, pass upon the claim distinctly made there, as in the court of original jurisdiction, that the statutes in question were in derogation of rights and privileges secured by appellant by the Constitution of the United States. But the final judgment necessarily involved an adjudication of that claim; for, if the statutes upon the authority of which alone the auditor of State proceeded, are repugnant to the National Constitution, that judgment could not properly have been rendered. This Court, therefore, has jurisdiction to inquire whether any right or privilege protected by the Constitution of the United States has been withheld or denied by the judgment below. And our jurisdiction is not defeated, because it may appear, upon examination of this federal question, that the statutes of Illinois are not repugnant to the provisions of that instrument. Such an examination itself involves the exercise of jurisdiction. The motion to dismiss the writ of error upon the ground that the record does not raise any question of a federal nature must, therefore, be denied."

(2) Where the validity of a statute of or an authority exercised under a statute is drawn in question on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity, if the federal question appears in the record and was decided, or if such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact

that it was not specially set up and claimed is not conclusive against a review of such question in this Court.

Water Power Co. vs. Street Railway Co., 172 U. S. 475, and especially pp. 487 and 488.

Yazoo & Miss. Valley Ry. Co. vs. Adams, 180 U. S. 14.

(3) If a Federal question be raised in a petition for rehearing, be considered, and be decided by the State Court, it forms the basis for a writ of error from this Court.

Mallett vs. North Carolina, 181 U. S. 589.

(4) Whether the obligation of a contract be impaired or not by State legislation involves a question of contract *vel non* and also of impairing legislation *vel non*.

St. Paul Gaslight Co. vs. St. Paul, 181 U. S. 142.

(5) Even if a State Court decide a case under the provisions of a statute or Constitution not open to attack on the ground of repugnance to the Constitution of the United States, and without reference to a legislative act alleged to be repugnant to the Constitution of the United States, still the question remains, whether by the decision of the State Court any effect was given to the act alleged to be repugnant to the Constitution of the United States, and that question suffices to maintain the jurisdiction of this Court and requires it to exercise its jurisdiction.

Houston & Texas Cent. R. vs. Texas, 177 U. S. 66-74.

(6) The prohibitions of the 14th Amendment refer to all the instrumentalities of the State—legislative, executive and judicial—and, therefore, whoever by virtue of public position under the State government deprives another of any right protected by that amendment against deprivation by the State violates the constitutional inhibition contained in the 14th Amendment to the Constitution of the United

States; and as he acts in the name and for the State and is clothed with the State's power, his act is that of the State.

Chicago, Burlington & Quincy Ry. Co. vs. Chicago, 166 U. S. 226.

(7) The contention that the defendant has been deprived of property without due process of law is not entirely met by the suggestion that he had due notice of the proceedings for condemnation, appeared and was admitted to make defense. The judicial authorities of a State may keep well within the letter of a statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that their action would be inconsistent with that amendment.

Ib.

(8) A judgment of a State court, even if authorized by statute, whereby private property is taken for public use, without compensation made or secured to the owner, is upon principle and authority wanting in the due process of law required by the 14th Amendment to the Constitution of the United States.

Ib.

(9) When a State descends from the plane of her sovereignty and contracts with private persons, she is regarded *pro hac vice* as a private person herself, and she is bound accordingly.

Curran vs. Arkansas, 15 How. 304-308, and cases there cited.

Von Hoffman vs. City of Quincy, 4 Wall. 535-554 et seq.

Davis vs. Gray, 16 Wall. 203.

Hall vs. Wisconsin, 103 U. S. 5.

Wolff vs. New Orleans, 103 U. S. 358-367.
Jeffries vs. Mut. Life Ins. Co., 110 U. S. 305.
Walker vs. Walker, 125 U. S. 339.

To these nine propositions sustained by reference to express decisions we may, as a corollary, add a tenth, formulated by ourselves, viz:

(10) Hence, when a State contracts with private persons, her contract becomes subject to her general laws on contracts, and a refusal by her courts to apply those general laws, is a denial of the equal protection of the laws, and therefore a violation of the 14th Amendment to the Constitution of the United States.

The application of the foregoing propositions of law to the case at bar is self-evident. The case of **Chicago vs. Needles, 113 U. S. 574,** has been cited by the counsel for the plaintiff both in the State court and in this Court as an authority alleged to sustain the proposition that a State may forfeit the charter of a corporation without subjecting the proceedings, legislative, executive and judicial, taken for that purpose, to invalidity on the ground of repugnance to the Constitution of the United States; but counsel overlooked the fact that the case of **Chicago vs. Needles,** whilst sustaining the right of the State to forfeit the charter of the plaintiff company under appropriate proceedings, *consistent with law*, expressly maintained the jurisdiction of this Court, and merely affirmed the judgment of the lower court after trial on the merits in this Court.

In amplification of what we have stated above, we further submit to the Court the following, to-wit:

The charter of the New Orleans Water Works Company (Appendix, pp. xx *et seq.*) is a document *sui*

generis. It partakes more of the nature of an ordinary contract between man and man than any charter that we have ever seen. The State was authorizing one of her governmental instrumentalities, to-wit., the City of New Orleans, to liquidate $2,000,000 of indebtedness by the transfer of certain property and franchises. Ordinary principles of charter law were not allowed to apply to the charter, but the charter contained special provisions providing for cases where forfeiture should occur; for other cases where partial forfeiture should occur; and for other cases where the rights of the consumer of water were to be enforced by the City through a writ of mandamus. In Section 13 of the original charter, provision was made that if the work contemplated by the charter before its amendment in 1878 (Appendix, pp. xxviii *et seq.*) were not done as prescribed, the corporation should forfeit not its charter, but all of its exclusive privileges, and the City should have a right to contract with anyone else for a supply of water, and to expropriate the property of the corporation by the act created. It next provided that if, after the completion of the new work and pipe, the Company should fail to extend its works from time to time throughout the entire limits of the City and suburbs, when the estimated revenue on the cost of extension should equal ten per cent., then in that event the charter should be forfeited. We therefore respectfully submit that, upon the rule that *expressio unius est exclusio alterius*, these were the causes of forfeiture of charter, and these were the only causes of forfeiture provided in and by the charter.

By Section 15 of the charter the right was given to the

Company to fix the rates of charges for water, subject to two conditions, to-wit: that the net profits of the Company should never exceed ten per cent. per annum and that the rates charged should never exceed those "now paid to the City;" and in case the Company should refuse compliance with a demand to cause its tariffs to conform to these conditions, the demand of the City for compliance was to be enforced by a writ of mandamus. That this was the remedy for any overcharge in rates provided by the charter, which was a contract between the City, the State and the Company; and that the Supreme Court of Louisiana erred in applying the severe and cruel punishment of forfeiture to the alleged derelictions of the directory of the Company as to rates, seems to us clear. The remedy by writ of mandamus was necessarily exclusive, not only because it was the remedy pointed out by the law, not only because the causes of forfeiture were named in the charter, and that this was not one of those causes, but also because it is inconceivable that the Legislature should have reserved the strong representation upon the Board of Directors to the City, which it did reserve to her if a remedy for the breach of the provisions of Section 15 was to be forfeiture of charter.

Consider the situation: the charter contemplated an exchange of all the Water Works stock for City bonds, so that the fact that the City to-day is a stockholder in the corporation to the extent of 3927 shares is accidental, and was not necessarily contemplated when the charter was passed. The original charter provided that at the annual election four directors should be elected by all the stockholders other than the City, and that the Mayor, the Administrator of

Water Works and Public Buildings and the Administrator of Finance, should be ex-officio directors of the Company, but that the City through her Mayor and Administrators should also have the right to vote at the election of directors, and at all meetings of stockholders in the same manner as any other stockholder. This part of the act was amended by the Act of 1878, in so far as to clearly take away from the City the right to vote at elections for directors. Why? Because, as stated in Section 1 of the Act of 1878, she "being already fully represented for the amount of her stock by the Mayor of the City, the Administrator of Water Works and Public Buildings and by the Administrator of Finance, who were ex-officio directors of the Company." The Company therefore started out with a directorate composed of seven members, three of whom were the City officials. This representation of the City has continued for over twenty years and has been out of all proportion to her accidental holdings of stock. The Company has existed for twenty-three years under this form of corporate organization. During the whole of that period the three City officials have sat in the councils of the Company, and have participated in all business transacted by it with the same right and the same powers as the other directors. They have never raised a whisper of protest or of objection to a single corporate act under consideration in this case. They have never claimed that any of the abuses or breaches of charter now complained of existed. They have never endeavored to change the corporate policy in any manner whatsoever. They have sat on the Board and voted for the declaration of dividends in favor of the City of New Or-

leans, as well as in favor of other stockholders, and large dividends were declared out of the gains of this corporation. The City has collected and profited by those dividends to the extent of about $300,000.00, and yet we are now told, by inference, that all of these precautions were entirely superfluous; that neither the State nor the City is affected by the fact that the government of this corporation was participated in and almost controlled by public officials named by law; that the provisions in the charter for the power of the City Council to appoint a committee with full power to investigate the books of the Company was a useless formality, and that the presence of a constant body of visitors within the most secret councils of this corporation does not in the slightest degree affect the rights of the State to forfeit the charter, because of an alleged breach of charter duty. Those officials continue to-day to sit at the council board of the Company, and, notwithstanding the charges made in the petition in this case, notwithstanding the evidence adduced in this case, not an effort has been made to change the policy of the Company; the City stands by, profiting by all of these alleged wrongs, and is now, by the decree of the highest tribunal in the State of Louisiana, to be authorized to further profit by her conduct by condemning the property of the Company and appropriating it to her own use after its value shall have been in large part destroyed by the destruction of its franchises. We respectfully submit that, under these circumstances which were to be foreseen if the Company did not comply with its charter, the writ of mandamus was provided as the exclusive remedy to be resorted to in order to enforce corporate duty.

We have referred above to the conduct of the City, intervening in this cause and seeking to obtain the condemnation of the property of the Company and appropriating it to her own use after its value shall have been in large part destroyed by the destruction of its franchises. We might perhaps be open to some criticism in addressing this argument to the Court upon the ground that it does not expressly appear in the record that this is the purpose of the City, but the following statement in the brief filed by the State in this Court as an argument in favor of the dismissal of this writ of error so clearly shows the motive of this litigation that we need only quote it as the authorization for what precedes. We quote from the brief filed by the State and the City of New Orleans in this Court, pages 11 and 12, as follows:

> "The Legislature of Louisiana, realizing that the old water supply was inadequate, in an extra session, called for the purpose, passed Act No. 6 of the extra session of 1899, creating a Sewerage and Water Board, which was approved August 18th, 1899, and charged the Sewerage and Water Board of the City of New Orleans with the duty of establishing a system of Sewerage, and of providing the inhabitants of the City of New Orleans with an adequate supply of pure and wholesome water, and on the vote of the people, voting a special tax to carry out the object of the said Water Board, and to pay the interest on the bonds authorized an issue of some sixteen millions of dollars, for the purpose of giving the City of New Orleans an adequate supply of pure and wholesome water, as well as Sewerage.
>
> "This Sewerage and Water Board has waited until the present time before actually commencing work, awaiting the final decision of the Supreme Court of Louisiana forfeiting the charter and monopoly fran-

chises of the New Orleans Water Works Company, in order that it might not be enjoined from prosecuting this most important public work—so important to the health of the inhabitants of the City of New Orleans. It has already awaited the result of the decision in this case since the Board was created, in August, 1899, occupying the time with preliminary surveys, calculations and estimates, and perfecting its plans, and now the time has arrived when it should actually commence work, and it should not be further retarded by delay in this Court on a Writ of Error in a case in which this Court has no jurisdiction, and in order to prevent injury to the public health and welfare, which would result from any further delay, we are constrained to press this matter on your Honors for a speedy decision, but the importance of the public interests require that there should be no further delay."

Here is a distinct admission that this Court should press this cause to an early decision, so that the physical property of the New Orleans Water Works Company, stripped of the right to use it for the purpose of supplying water to the City, and stripped of all its monopoly features, and thus depleted in value, may fall an easy prey to the power of eminent domain to be exercised by the State, or may at least prove no obstacle to the establishment of a rival system by the public without the inconvenient expense of condemning the property and franchises of the New Orleans Water Works Company at all.

That the decision of the Supreme Court of Louisiana will have the effect of impairing the value of the property of the New Orleans Water Works Company by depriving that Company of its franchises, and that as the result of this deprivation, nearly two million dollars of public indebtedness will have been extinguished without payment, thus

clearly appears from the record, together with the admissions in the brief filed by the State and City of New Orleans.

In view of all the foregoing facts; in view of the special provisions in the charter contract for forfeiture in certain cases only, we respectfully submit that to punish this corporation by forfeiture of its charter for an alleged error as to the rates charged by it, for the correction of which error a special remedy is provided, and which alleged error has been acquiesced in for nearly a quarter of a century, is a judicial sentence consonant neither with equity, with justice, nor with the good faith, which the public ought to keep with a *quasi* public servant, nor is it consistent with the contract between the Water Works Company, the State and the City, set forth in the charter of the Company, and resulting from said charter and the municipal action taken thereunder.

We submit that under the charter no pretended neglect, mistake or failure to perform the duties imposed upon the Company by Section 15 of Act No. 33 of 1877 can be made a lawful ground for this action, or for forfeiture of the franchise rights or property of the defendant by the State until after the defendant shall have had its day in Court, at the suit of the City of New Orleans, and shall have wilfully neglected, failed or refused to comply with any lawful judgment against it in such suit, if such judgment be adverse to the decision of its own Board of Directors, fixing a tariff of rates. And the forfeiture of defendant's charter without judicial proceedings establishing maximum water rates, and without a disregard by defendant of said rates, and under the circumstances hereinabove set forth, is a denial

to the defendant of due process of law, a taking of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States; and the legislative resolution under which this suit is brought, if construed as authorizing this suit, and the judgment herein, are laws impairing the obligation of the charter contract of the defendant with the State of Louisiana, and the City of New Orleans, which contract is protected from impairment by the Constitution of the United States.

The charter and amended charter of the defendant Company constitute a synallagmatic, commutative contract between the Company on the one side and the State of Louisiana and City of New Orleans on the other, which contract could not, under the laws in force at the time when the charter and amended charter were granted, be rescinded or dissolved, except upon tender back by the complaining party to the defendant of the price and consideration paid by such defendant under the contract sought to be rescinded or dissolved, and neither the City of New Orleans nor the State of Louisiana has at any time tendered back to the defendant the price and consideration that the defendant paid for its corporate life, franchise and other property, nor the value and cost of any betterment or betterments of said property by the defendant while in possession thereof, nor has either of them in any way offered or attempted to restore the defendant to its condition as it existed at the time when the charter and amended charter were passed, and when the defendant purchased its corporate life, franchises and other property from the State, which offer and tender were and are required by the

general laws of the State of Louisiana existing and in force at a time when the said charter and amended charter were granted, and at all times since; and the decree of forfeiture in this cause, without any decree of *restitutio in integrum*, gives a construction to the legislative resolution under which this action has been brought violative of the obligations of defendant's charter contract, and also constitutes a taking of defendant's property by the State of Louisiana without due process of law.

A charter is a contract. The ordinary charter granted by a State is a unilateral contract and cannot in principle be distinguished from State grants of land, which ever since the case of **Fletcher vs. Peck, 6th Cranch, 87,** have been held to be contracts protected from impairment by the contract clause of the Federal Constitution. A contract granted in exchange for property or money, is a synallagmatic, commutative contract. This principle is referred to and clearly stated by French advocates consulted by the French East India Company, in Paris, as far back as 1788. In a note to the **Dartmouth College case, 4th Wheaton, 518-713,** we find the following interesting statement of fact and of law:

> "In the discussion, which arose in France in 1786, upon the new charter then recently granted to the French East India Company, it seems to have been taken for granted by the lawyers on both sides, to whom the questions in controversy were submitted by the Company, and by the merchants who considered themselves injured by its establishment, that if the charter had regularly issued according to the forms of the French law, it was irrevocable, unless forfeited for non-user or mis-user. The advocates (MM. Lacretelle and Blonde), who were consulted by the merchants of the

kingdom opposed to the establishment of the Company, denied its legal existence, on the ground that the king had been surprised in his grant; that it was not yet perfected by the issuing of letters patent, nor duly registered by the parliaments; and that it both might and ought to be suppressed, as an illegal grant of exclusive privileges, contrary to the true principles of commercial philosophy.

"On the other hand, it was contended by the Company that their grant was irrevocable; that it was but a renewal and confirmation of the charter of the old Company, which had been suspended in 1769, in consequence of the immense losses of capital sustained in the calamitous war of 1756 (but which suspension was at the time solemnly protested against by the parliament of Paris as illegal); that their new grant might still be perfected by letters patent, which the faith of the king was pledged to issue; and that the privileges thus granted to them were irrevocably vested as a right of property, of which they could not be deprived by any authority in the kingdom. 'En effet, quand le roi accorde un privilége exclusif, ce privilége est le prix d'une mise de fonds, dans un commerce hazardeux, dont l'entreprise est jugée avantageuse à l'état. De là naît par conséquent un contrat synallagmatique, qui se forme entre le souverain et les actionnaires. De là naît un droit de propriété qui devient inébranlable par le souverain lui-même.' And of this opinion were the advocates (MM. Hardoin, Gerbier, and DeBonnieres), consulted by the Company. *See a Collection of Tracts on the French East India Company, Paris, 1788, in the Library of Congress.*"

Thus it will be seen thirty-one years before the Dartmouth College case was decided, and in the days of monarchial France, prior to the Revolution, the doctrine was already recognized that where the King granted an exclusive privilege, which was the price given for an investment in a

hazardous commerce adjudged to be advantageous to the State, there was implied from these relations a synallagmatic contract formed between the sovereign and the stockholders, giving rise to a right of property beyond the reach of the sovereign himself. This principle, thus recognized under a despotism, and recognized by this Court in the Dartmouth College case, is all that we ask to have recognized in this case.

If a charter confers no other franchise upon the incorporators or stockholders than the franchise to be a corporation, as is the case in the vast majority of cases, the contract between the sovereign and the stockholders is a unilateral one. The sole franchise given is a franchise to be a corporation, which franchise is subject to a tacit resolutory condition in the event that the corporation should misuse its powers. When the condition occurs the contract is rescinded, and, being unilateral, no consideration has passed from the corporation to the State, and therefore nothing is to be returned by the State to the corporation. This is the usual case of forfeitures, and this is the case of **Chicago vs. Needles, 113 U. S. 574.**

But suppose that the State vests a franchise to be a corporation in a certain number of persons, and furthermore sells to those persons thus incorporated the exclusive franchise of furnishing water, gas or any other commodity to any given municipality in the State. It is not evident that in such a case a synallagmatic contract results, and that when the tacit resolutory condition takes place, the State is under the general law governing her contract, as it does the contract of any individual, required to restore the ben-

efits which she obtained from the contract, at the same time that she forfeits the charter?

In the case at bar, the State vested the franchise of being a corporation in the Water Works Company, and further vested in it the exclusive franchise of furnishing water to the City during a period of fifty years in exchange for the surrender by persons acquiring the stock of that corporation of $2,000,000 of municipal indebtedness. If an attempt had been made to forfeit this franchise within a few short months after it had been granted, and if the State at that date had attempted to retain, or allow her creature, the City of New Orleans, to retain the consideration paid for the franchise, every honest man would have recoiled from the apparent injustice. It would have readily been recognized that the remedy of the State, setting aside her contract, was to be the same as that of any individual setting aside his contract, and that a *restitutio in integrum* should take place. And so in the present case the exclusive water furnishing franchise granted by the State to this corporation is an asset upon which it sold its stock and it cannot be taken back without returning the price paid for that stock, to-wit: $2,000,000 in bonds of the City of New Orleans.

The *restitutio in integrum*, which is the State's remedy if she wishes to dissolve her synallagmatic contract, would require an accounting between her and this corporation and the tender to the corporation, or at least the offer to return to it the consideration given in exchange for the monopoly and other franchises now sought to be forfeited.

If this were the case of a private contract there could be no doubt that the foregoing principle would prevail, and

we know of no law differentiating a private from a public contract. The Supreme Court of Louisiana in its opinion refers to the fact that this suit was brought under the authority of a resolution passed by the Legislature of the State of Louisiana. That resolution did not direct the Attorney General to seek a forfeiture of the charter of this corporation, but to take such action in the premises as he might deem proper. This meant the action allowed under the general laws of the State for the dissolution of a synallagmatic contract. If it meant more, and meant to authorize the forfeiture of the charter without a return of the price paid for the franchises granted to the Company, then that resolution was a statute violating the obligation of a contract and violating the contract clause of the Constitution of the United States, and the action of the State of Louisiana in attempting to deprive the defendant of its property without compensation, is an attempt to deprive it of its property without due process of law, contrary to the Constitution of the State of Lousiana and to the Fourteenth Amendment to the Constitution of the United States.

The Court, in **Curran vs. Arkansas**, and the other cases cited *supra*, has expressly stated that a State contracting with an individual descends from the plane of her sovereignty, is regarded *pro hac vice* as a private person, and is governed accordingly.

That a State suing for forfeiture of a charter is subject to the same rules of law as a private individual suing for a forfeiture or rescission of a contract is expressly held by the Supreme Court of Louisiana in **State ex rel. vs. Attorney General, 30 An.**, where that Court said:

> "Charters of incorporation are treated as contracts, and if one of the terms of the charter be violated, the

other contracting party, the State, may demand the forfeiture by suit, *just as in a contract between two individuals.*" (Italics ours.)

State ex rel. Attorney General vs. Lannes, 30 An. 954, 958.

That the rights of a private individual in a like case would be only to a *restitutio in integrum* is expressly provided by the Articles of the Civil Code of Louisiana quoted in the Appendix; and is over and over expressly decided by the Supreme Court of Louisiana. That Court has repeatedly said that:

> "The resolutory condition operates a dissolution of the sale or other contract, and replaces the parties as they stood before. The vendor takes back the property, and all its revenues since the sale are restored to the vendor; and on the other hand the vendee takes back the price with interest."

Civil Code, 2045, 2046, 2561.

Johnson vs. Bloodworth, 12 An. 699.

Citizens Bank vs. Cuny, 12 Robinson, 279.

McKenzie vs. Bacon, 41 An. p. 6 et seq.

The refusal to apply these same principles to the State's contract is clearly a refusal to defendant of the equal protection of the laws, contrary to the provisions of Article 14 of the Amendments to the Constitution of the United States.

We submit that a consideration of the questions raised by the assignments of error, and restated in the seven inquiries suggested above, pages 25-26, can leave no doubt that there was drawn in question in this cause the validity of a statute or an authority exercised under the State of Louisiana on the ground of their being repugnant to the Constitution of the United States and that the decision was

in favor of their validity; and that a right, title, privilege and immunity was claimed by the New Orleans Water Works Company under the Constitution of the United States and that the decision was against the right, title, privilege or immunity specially set up and claimed by such Waterworks Company under said Constitution of the United States.

We submit that, in this cause, there was drawn in question the validity of the joint resolution of the Legislature of the State of Louisiana, under which the Attorney General brought this suit upon the ground that it was repugnant to the Constitution of the United States and because it violated the obligation of the charter contract of the Water Works Company, and deprived that Company of property without due process of law; and that there was also drawn in question the validity of the exercise of the power by the State of Louisiana through her legislative, executive and judiciary departments, or either or all of them, of forfeiting the charter of the New Orleans Water Works Company, on the ground that the exercise of said power was repugnant to the Constitution of the United States because it deprived the New Orleans Water Works Company of its property without due process of law, and because it denied to the New Orleans Water Works Company the equal protection of the laws; and upon all of these grounds we respectfully submit that the motion to dismiss or affirm made by defendants in error should be dismissed.

Respectfully submitted,

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APPENDIX.

No. 13,701.

SUPREME COURT OF LOUISIANA.

State of Louisiana

vs.

New Orleans Waterworks Company.

Assignment of Errors.

Now comes plaintiff in error in the above entitled cause, and on its writ of error from the Supreme Court of the United States says that in the record and proceedings in said cause there is manifest error to its prejudice which it assigns as follows:

I.

The said Supreme Court of Louisiana erred in deciding against the validity of an authority exercised under the authority of the United States drawn in question in this cause.

II.

The said Supreme Court erred in deciding against the title, right, privilege and immunity specially set up and claimed by plaintiff in error under the Constitution and statutes and authority exercised under the United States.

III.

The said Supreme Court erred in deciding in favor of the validity of statutes and authorities exercised under the State of Louisiana, drawn in question in this cause, on the ground of their being repugnant to the Constitution and laws of the United States.

IV.

The said Supreme Court erred in giving validity to the resolution of the General Assembly of the State of Louisiana, commonly known as Act 150 of the Acts of the Legislature of the State of Louisiana for the year 1898, which was drawn in question in this cause under a construction

thereof which impaired the obligation of the contract entered into between the State of Louisiana and the New Orleans Waterworks Company, being the Charter of said New Orleans Waterworks Company.

V.

That the said Supreme Court erred in sustaining the validity of the authority exercised under the State of Louisiana by the Attorney General and courts of said State in forfeiting the charter of the defendant Company under and in accordance with the provisions of said legislative resolution, as construed by said Honorable Court, and the validity of which authority was drawn in question in this cause, on the ground of its being repugnant to the Constitution and laws of the United States.

VI.

That the said Honorable Supreme Court erred in affirming and sustaining the validity of the action of the State of Louisiana through her Attorney General and courts in forfeiting the charter of petitioner, otherwise than in manner and form provided by said charter itself, whereby plaintiff in error was denied due process of law, and its property taken without due process of law, and in violation of the Constitution of the United States, and especially the Fourteenth Amendment thereto; and the validity of which action was drawn in question in this cause.

VII.

That the said Supreme Court erred in failing to find that the Charter and amended Charter of the plaintiff in error constitute a synallagmatic, commutative contract between it on the one side and the State of Louisiana and City of New Orleans on the other, which contract could not, under the laws in force at the time when said Charter and amended Charter were granted, be rescinded or dissolved, except upon tender back by the complaining party to the defendant of the price and consideration paid by such defendant under the contract sought to be rescinded or dissolved, which offer and tender were required by the laws of the State of Louisiana existing and in force at the time when said charter and amended charter were granted,

and at all times since; and that the decree of forfeiture in this cause, without any decree of *restitutio in integrum*, gives a construction to the legislative resolution under which plaintiff's action was brought, violative of the obligation of the charter of plaintiff in error, which charter is a contract protected from impairment by any law of the State of Louisiana by the Constitution of the United States, and especially by Article 1, Section 10 of said Constitution; and that the validity of said construction of said legislative resolution and of said decree rendered thereunder were drawn in question in this cause.

VIII.

That said Supreme Court erred in decreeing said forfeiture without a *restitutio in integrum*, because the same constitutes a taking of the property of plaintiff in error by the State of Louisiana without due process of law, and in violation of Article XIV of the Amendments to the Constitution of the United States, and that the right to so take said property was drawn in question in this cause.

IX.

That said Supreme Court erred in deciding in favor of the validity of the action of the State of Louisiana, and of the authority exercised under her by her Attorney General and Courts in this cause, and drawn in question therein, and which if held valid, deprive plaintiff in error of property without due process of law, and without compensation, and in violation of the Constitution of the United States, and especially of the Fourteenth Article of the Amendments thereto.

X.

That the said Supreme Court not only erred as set forth and disclosed in the preceding assignment of errors herein numbered VII, in manner and form as therein set forth, but also further erred in so construing the acts of the Legislature of the State of Louisiana constituting the charter of the said New Orleans Waterworks Company as to eliminate therefrom and destroy valuable franchises, immunities, rights, exemptions and privileges therein granted to the said New Orleans Waterworks Company by direct unambiguous grant

and contract with the State of Louisiana, for which the said New Orleans Waterworks Company paid a valuable consideration either in money or its equivalent and also rights of like character granted and conferred on said Company by lawful implication for like consideration.

XI.

That said Supreme Court particularly erred in its construction of the meaning and legal import of the Fifteenth Section of Act No. 33 of the Acts of the Extra Session of the Louisiana State Legislature of 1877, being a section of the charter of the New Orleans Waterworks Company, which is in the words and figures following, to-wit:

> "Sec. 15. Be it further enacted, etc., that the said Waterworks Company shall have the right to fix the rates of charges for water; provided, that the net profits of the Company shall not exceed ten per cent. per annum, and shall publish sworn annual statements of its business and condition; and that the City Council shall have the power to appoint a committee of not less than five, who shall have access to the books of the said Company, and make such extracts from the same as they may deem necessary, and in case the said profits shall exceed ten per cent., the City Council shall have the right to require said Company to reduce the price of water in such manner, and in such a proportion, that the profits shall never exceed the above named rates. *And provided further*, that the rates charged shall never exceed those now paid by the City, and in case said Company shall refuse compliance, the demand of said City may be enforced by a writ of mandamus."

which said Section 15 should have been construed by the said Supreme Court as conferring upon the said New Orleans Waterworks Company a State delegated right and power of legislation about and concerning the rate of charges for water supply, together with the legal presumption of the correctness of such legislation by the said corporation on the subject of the rate of charges for water supply. That said right of legislation on said subject was, and

is, subject only to the conditions and limitations contained and set forth in said Section 15. And that by the terms of said Section the correctness and legality of the rate of charges for water supply so established can only be impeached or questioned in the special and particular manner designated and pointed out in said Section 15; that is, through the action of the City Council of the City of New Orleans availing itself of the power of visitation provided for in said Section, and by revision and modification of the water rates established by such legislation of the New Orleans Waterworks Company in the manner and form provided in said Section 15. And that, if after such action by the City Council of New Orleans, the said New Orleans Waterworks Company disputed or questioned the correctness of the action of the City Council in so establishing water rates, said Company was, and is, lawfully entitled to its day in court to test the correctness of such action by the Council concerning such Waterworks Company's water rates. And that, in no event was, or is, the charter of the said New Orleans Waterworks Company subject to forfeiture for any water charge in accord with its own rate established by its own legislation, but in excess of the rate so established by the City Council of the City of New Orleans, until it shall have acquiesced in the water rates established by the Council of the City of New Orleans or until it shall have demanded and charged water rates in excess of such water rates as may have been confirmed and established by a court of competent jurisdiction on the writ of mandamus specified in said Section 15, wherein there shall have been final decree, and the said New Orleans Waterworks Company have had its day in court in such litigation.

That the means and method provided in said Section 15 of said Act No. 33, for fixing and regulating the water rates to be charged by the defendant, and for compelling this defendant to comply with the rates thus established, are a substantial part of the contract between the State of Louisiana, the City of New Orleans and the defendant, and that this contract was protected by the Constitution of the

United States from impairment by the State of Louisiana, and that consequently the resolution of the General Assembly, directing an action to forfeit defendant's charter for overcharge in rates, the action thereunder brought for that purpose by the Attorney General and the judgment of the Court decreeing such forfeiture on such ground solely in the face of the facts,

1st. That the Council of the City of New Orleans had never objected to any water rates charged by the defendant.

2nd. That the said Council had never ordered this defendant to change or modify any rate charged.

3rd. That the said Council had never brought any mandamus proceeding against this defendant to compel it legally to change its water rates.

4th. That the State of Louisiana had never theretofore complained of any water rates charged by this defendant, and had never demanded that such rates be changed.

5th. That defendant had acted in good faith in fixing its rates under the power granted it.

6th. That the State of Louisiana and the City of New Orleans had acquiesced in the rates charged for more than fifteen years.

7th. That the net profit received by the Company never exceeded and never even reached ten per cent. per annum; was an impairment of the obligation of said contract by the State of Louisiana, in contravention of Section 10, Article I of the Constitution of the United States.

XII.

That the said Supreme Court erred in that the only averment and allegation contained and set forth in the petition of the State of Louisiana herein wherein overcharge for water supply by the New Orleans Waterworks Company is charged to have violated any alleged established rate of water charge established by the City of New Orleans while that City was the owner of and operated the said Waterworks now owned and operated by the New Orleans Waterworks Company is contained and set forth in the fifth sub-division of the peti-

tion of the State of Louisiana in the words and figures following, to-wit:

> "(5). The said Company was, and is prohibited by Sec. 15 of its charter from charging for the use of water supplied by it any more than the rates paid to the City of New Orleans in 1877; the Legislature meaning thereby the rates legally fixed and adopted by the City Council in 1870, which were the only rates legally in force and legally exacted by the City of New Orleans in 1877; and petitioner avers that the said Company has habitually, from 1878 to the present time, illegally exacted and collected greater rates than those legally exacted and collected by the City of New Orleans for same quantities of water supplied, or same facilities and opportunities for drawing water from its pipes."

And the said Supreme Court after having judicially found and determined that there never had been in existence any such rates lawfully fixed and adopted and promulgated by the City Council of the City of New Orleans in 1870, and that no ordinance of the City of New Orleans of the character or effect averred had ever had legal existence, and that there was absolute failure of proof of the existence of any such ordinance or water rates as averred in the said petition; and the fact being that no other rate or water charge is alleged by the State to have been violated by overcharge by the New Orleans Waterworks Company, or is set up or contained in said petition or in any manner put at issue therein, or could be legitimately tried in said cause, the said Supreme Court erred in considering against the objection of the said counsel of the New Orleans Waterworks Company, depositions and other sources of information, and therefrom attempting to construct or create for the purposes of this case another and different schedule or rate of water charges not averred or set forth by the State of Louisiana in its petition herein, and erroneously used and considered said schedule and alleged rate of water charges, so established by said Court, as the standard legal rate of water charges obligatory upon the New Orleans Waterworks Company, and decreed a for-

feiture of the charter of said Company because of a conclusion that the rate of water charges collected by the New Orleans Waterworks Company was in excess of said new and unpleaded schedule of water rates so established by the Supreme Court, at variance with the averments of the State of Louisiana in its petition herein, and as to the correctness whereof the said New Orleans Waterworks Company never having been in any manner impleaded in any form required by the statutes of the State of Louisiana governing the procedure of courts in such causes that were in force either prior to the time that the charter of the said New Orleans Waterworks Company was granted by the State of Louisiana, or at any date since that time.

That the interpretation by the State in her pleadings of said Section 15, to the effect that the Legislature intended by the water rates then paid to the City of New Orleans to designate such rates as were fixed and established by some law or ordinance of the City of New Orleans, is the true and correct meaning of said Act (because such rates could not be fixed in any other way than by an ordinance), and therefore, such was the contract between the State and the defendant.

That the Court, having found that the particular Ordinance of 1870, averred in the State's petition as the one contemplated by the Legislature, had never been lawfully adopted or promulgated by the City of New Orleans, such finding was the end of the case on that point, and the subsequent action of the Court at the request and instance of the Attorney General, acting under the joint resolution aforesaid, in substituting for an ordinance (which alone by the legislative contract could be the measure of defendant's rights and a condition upon which its franchises were granted) a mass of facts *en pais*, such as the rates charged in particular cases by executive officials of the City to particular persons (on which issue the defendant was not impleaded), was an impairment by the State of the obligations of defendant's contract, and a taking of defendant's property without due process of law, and without compensation made, in contravention of the Constitution of the United States.

XIII.

That said Supreme Court erred in adjudging the said several exceptions, peremptory and other, as pleaded by defendant to the petition of the State, and to the interventions, were not generally well taken and sufficient in law, and in overruling and giving the same no effect in law in arriving at a decree in this cause.

XIV.

That said Honorable Supreme Court erred in this, that if said resolution or ordinance of the City Council of New Orleans, referred to by plaintiff in its petition, either by itself, or in connection with said joint resolution of the Legislature of the State of Louisiana in said petition referred to, be any authority, lawful direction or warrant to the Attorney General of the State of Louisiana to institute and prosecute this action, and if the same be held by the courts to be such authority, lawful direction or warrant, then said resolution of said City Council, as well as said joint resolution of said State Legislature, are repugnant to law and to the Constitution of the United States, and especially to Section 10 of Article I of said Constitution, as impairing the faith of a contract between the defendant and the State of Louisiana, in which the City of New Orleans, an integral part of the State, was chief beneficiary, as well as a party, and bound to observe good faith and fair dealing in respect thereto in its legislation, and that said resolution of said City Council, together with said joint resolution of said State Legislature, are also repugnant to the Fourteenth Amendment to said Constitution of the United States, in this that they deprive plaintiff in error of its property without due process of law and without compensation made.

XV.

That said Supreme Court erred in not affirming the judgment of said Honorable Civil District Court, and rendering judgment in favor of plaintiff in error.

Wherefore, plaintiff in error prays that the judgment of said Supreme Court be reversed, and for such further proceedings as law and justice may require.

AN ACT

To Incorporate the Commercial Bank of New Orleans.

Whereas, sundry inhabitants of the city of New Orleans have petitioned this General Assembly, setting forth that they are desirous of establishing a company in the city of New Orleans, invested with banking privileges, and to be entitled the "Commercial Bank of New Orleans:" the chief object of which said company is to be the conveying of water from the river into the city of New Orleans and its faubourgs, and into the houses of its inhabitants: and whereas, the said object will greatly contribute to the security of the said city from fire, and to the health and convenience of the inhabitants, and the agricultural and commercial interests of this State may be greatly promoted by extending to said company the privileges required, therefore,

* * * * * *

Sec. 4. Be it further enacted, etc., That all such persons as shall become subscribers to said company, their successors and assigns, shall be and are hereby created and made a corporation and body politic, by the name and style of the Commercial Bank of New Orleans, and by that name shall be and are hereby made capable in law, to have, hold, purchase, to receive in payment of debts, possess, enjoy, and retain, to them and their successors, property and estate of what nature, kind, or quality soever, or so far as is necessary to carry into complete effect the object of this charter, which is declared to be the furnishing of the city with good and wholesome water; and the same to alien, transfer and dispose of, to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in any court or courts of record, or other place whatsoever; to have forever the exclusive privilege, from and after the passing of this act, of supplying the city and inhabitants of New Orleans, and its faubourgs, with water from the River Mississippi, by means of pipes or conduits, and for erecting, constructing, or working of any necessary engine; and they may contract for, purchase or lease the right to enter and pass through, from time to time, as occa-

sion may require, any lands or grounds through which they may deem it necessary to convey the said water into said city and its faubourgs, and to construct, dig, or cause to be opened, any canals or trenches whatsoever, for the conducting of the water of the river from any place or places that they may deem fit, and to raise and construct such dykes, mounds or reservoirs, as they may judge proper, for securing and conveying such supply of water, as aforesaid, to the said city and the faubourgs thereof, and to survey such lands as they may think proper, in order to ascertain the best mode of furnishing such supply, and to lay and place any number of conduits, pipes and aqueducts, and to cleanse or repair the same, through or over any of the lands or streets of the city of New Orleans and its faubourgs, and also to have and use a common seal, and the same to break, alter and renew at pleasure; and also, through their president and directors, to ordain, establish, and put in execution, such by-laws, ordinances and regulations as shall seem necessary and convenient for the government of said corporation, not being contrary to this act, nor to the constitution and laws of the United States, or of this State or ordinances of the city council of New Orleans, and generally to do and execute all such acts, matters and things, as to them shall or may appertain to do, subject, nevertheless, to the rules, regulations, restrictions, limitations and provisions hereinafter specified and declared. Provided, however, that at any time after the expiration of thirty-five years from the passage of this act, it shall be lawful for the corporation of the city of New Orleans to purchase from the Commercial Bank of New Orleans, the water works constructed by said company, in virtue of this act—and said company shall not refuse to sell the works aforesaid, with all the rights and privileges appertaining to the same, on the terms hereinafter provided.

* * * * * *

Sec. 11. Be it further enacted, etc., That said company shall, within twelve months after the first election of directors, commence works, and commence to procure such materials

as may be necessary to enable them to furnish the inhabitants of the city of New Orleans and its faubourgs with sufficient water from the river at all seasons of the year; and in order that the true intent and meaning of this act be strictly adhered to and complied with, and that the water works contemplated to be constructed by said company, to be completed in the shortest time practicable, under all the circumstances, the sum—at least one hundred thousand dollars shall be expended on the works aforesaid, annually, until the said company is in a situation to supply, and actually do supply, water to the greater part of the streets of the city proper, and the principal and most populous streets of the faubourg—said expenditure to commence within one year after the passage of this act—so that the city of New Orleans and the faubourgs thereof may be furnished with water in the streets, and such inhabitants may procure it by means of conduits or pipes, within their houses and lots, at a price to be regulated by the company; and should the said company fail or neglect either to commence or continue said works as aforesaid, then, and in such case, the charter now granted shall be wholly null and void; provided, however, that the net profits on the same shall not exceed an interest of fifteen per centum per annum, from the time of disbursements on said works; and at such times as dividends shall be declared by the bank, say semi-annually, the interest on the sum expended in constructing said water works shall be added thereto, and shall form part of the capital invested, until the net revenue of said works amount to fifteen per centum as aforesaid; and provided also, that the city council of New Orleans shall have the power, annually, to appoint a committee, who shall have access to such of the books of said bank as relate to the said water-works company, and may make such extracts from the same as they may think necessary; and provided, further, that at the end of five years after the first appropriation, the said net profits shall not exceed ten per cent.—and in case said profits should exceed fifteen per centum during the first five years and ten per centum afterwards, as provided for in this section, the city council

shall have the power to reduce the price of water, in such a manner and in such a proportion that the profits should never exceed the above-mentioned rates.

* * * * * *

Sec. 21. Be it further enacted, etc., That within the first thirty days that the books are opened for subscription, the corporation of the city of New Orleans may subscribe for five thousand shares of the capital stock of said company, not subject to deduction; and for which the said company may receive the bonds of the mayor, aldermen and inhabitants of New Orleans, redeemable in forty years, bearing an interest not exceeding five per centum per annum, payable half yearly.

Sec. 22. Be it further enacted, etc., That if, agreeable to the twenty-first section of this act, the corporation of the city of New Orleans shall subscribe for five thousand shares of the capital stock of the Commercial Bank of New Orleans, then, and in that case, the city council of New Orleans shall annually elect, by ballot, from the mayor, recorder, and aldermen of said council, two persons, who shall be members of the board of directors; and the stockholders shall only elect eleven instead of thirteen directors, as provided for in the third and sixth sections of this act, in which election the said city council shall not vote as stockholders; provided, that nothing herein contained shall be so construed as in any manner to impede, diminish or impair the rights and powers granted to the city council of New Orleans, and to the committee to be appointed by them annually, by virtue of the eleventh section of this act.

Sec. 23. Be it further enacted, etc., That the provisions of the thirteenth section of this act, relative to half-yearly dividends, shall not be so construed as to apply to the stock, subscribed for and owned by the corporation of the city of New Orleans; the dividends arising from the shares so owned shall be applied, first, to the payment of the interest on the bonds given to the Commercial Bank of New Orleans for the stock subscribed by the said corporation, and the surplus shall be passed to the credit of the said corpo-

ration, half yearly, at such times as dividends are payable to other stockholders, to be set apart as a sinking fund, applicable alone to the payment of the bonds of said corporation when they shall become due, and the said corporation shall be allowed an interest of five per centum per annum on the same by the Commercial Bank of New Orleans.

SEC. 24. Be it further enacted, etc., That if the corporation of the city of New Orleans shall fail to subscribe for five thousand shares of the capital stock of the Commercial Bank of New Orleans within the first thirty days the books are opened for subscriptions, the twenty-first, twenty-second and twenty-third sections of this act shall be considered null and void and of no effect.

* * * * * *

SEC. 33 Be it further enacted, etc., That in the city of New Orleans, its suburbs and adjoining lands laid out in town lots, the company shall have the power of using the streets and public places for the purpose of placing pipes to run the water; provided, they do not obstruct the said streets longer than will be absolutely necessary for the said purpose, or for making any repair; and provided they restore the said streets to the same condition they were before in as short a time as possible; that within the said limits it shall not have power to place any pipe, or do any work upon any lots of ground, without the consent of the owner; and that out of the said city, its suburbs and the lands laid out in town lots, if the said company shall not be able to agree with the proprietor or proprietors of lots of ground through which it may be necessary to run the water, through pipes or otherwise, as the directors may deem expedient, for the purpose of introducing water into the said city and its faubourgs; or if such owner or owners shall be absent, out of the State, or unknown, or shall, from incapacity, legal or otherwise, be precluded from making any contract or agreement in relation thereto, it shall and may be lawful, on the application of the president and directors of the Commercial Bank of New Orleans, for the judge of that judicial district of Louisiana wherein the city of New Orleans is, or may be hereafter, situated, to issue his war-

rants to the sheriff of the parish of Orleans, commanding and directing him to summon, from his parish, a jury of fifteen inhabitants of said parish, not related to or connected with the owner or owners, person or persons, interested in the said lots of ground, which the said company may deem expedient to enter upon and use, for the purpose of introducing water as aforesaid into the city and faubourgs, and who shall be proprietors of immovable property in said parish, to meet and appear on the premises which are to be valued, and such valuation shall be begun to be made by them on such day as in such warrant shall be appointed, of which ten days' notice shall be given by the said president to every owner, or owners, or person interested as aforesaid, etc.

* * * * * *

Sec. 36. Be it further enacted, etc., That if any person or persons shall obstruct the said company, their successors, agents, workmen or servants, in conveying the said water into the said city and its faubourgs, or shall change, alter, remove, injure or destroy, any work or part of a work made by the said company, or cause to be made, for the purpose of introducing water into the city of New Orleans and its faubourgs, under the authority of this act; or if any person shall alter, obstruct, change or pollute, by any tan yard, hog-stye, slaughter-house, dye-pot, or otherwise, the waters or streams which the said company shall hereafter introduce, or shall be preparing to introduce into the city of New Orleans and its faubourgs, under the authority given and regulations prescribed by this act, such person or persons shall be indicted in the proper court for the trial of offenses within the parish of Orleans committed, and being thereof convicted, shall be fined at the discretion of the court, according to the nature of the offense, and imprisoned for any time not exceeding seven years; such fine to be paid and applied to the use of said company.

* * * * * *

Sec. 38. Be it further enacted, etc., That the corporation of New Orleans shall be supplied by the said company, free of charge, with all water necessary for the extinguishment

of fires and other public purposes; nor shall the city council be subject to any charge for water furnished to supply the gutters of the said city and faubourgs; and that the said company, as they progress in laying aqueducts, shall place, free of any charge whatever, two hydrants of a proper construction, in front of each square, at a suitable distance from each other, from which a sufficient quantity of water may be conveniently drawn, for extinguishing fires, for wetting, washing and watering the streets and gutters, and any other public purpose; that on the squares which do not front on the river, the hydrants shall be placed on opposite sides of the streets, at an equal distance from each other and the corners; that the said hydrants shall be of a proper size and made so as at all times to furnish water for the fire-engines, and purposes herein mentioned; it shall further be the duty of said company to supply water for all the purposes herein mentioned, at all times during the continuance of this charter, unless prevented by some unavoidable accident, and in case such shall occur, the repairs shall be made and the water again furnished at the expiration of the necessary delay; and the said company shall supply a sufficient quantity of clear, pure and wholesome water for the use of the inhabitants, within the limits aforesaid, at the elevation of fifteen feet, when the same may be required. Provided, however, that said hydrants shall be under the control of the Commercial bank.

* * * * * *

Sec. 41. Be it further enacted, etc., That the second section of this act shall not be so construed as to apply to the payment of ten dollars per share at the time of subscribing, on the stock subscribed for by the city council of New Orleans. But said corporation shall, within thirty days from the organization of the first board of directors of the Commercial Bank of New Orleans, execute in the form required by the directors, the bonds of the mayor, aldermen and inhabitants of New Orleans, to the order of the president and directors of said company for the full amount of stock subscribed by the corporation aforesaid, say five

hundred thousand dollars, bearing an interest of five per centum per annum, payable in forty years, the interest on said bonds to be paid semi-annually; and should the bonds taken by said company, from the corporation aforesaid, be sold at a premium, such premium or excess, over and above their par value, shall form a part of the sinking fund, as provided for in the twenty-third section of this act.

SEC. 42. Be it further enacted, etc., That when, after the expiration of thirty-five years, the said corporation of New Orleans shall be inclined to buy the said water works from the Commercial Bank of New Orleans, the price shall be fixed by arbitrators, five of whom shall be chosen by the president and directors of the Commercial Bank of New Orleans, and five by the city council of New Orleans; said arbitrators not to be stockholders in said company, nor members of the city council of New Orleans. Said arbitrators shall take into consideration the value of the water works and grounds appertaining thereto, for supplying the city and faubourgs of New Orleans with water by the said company; and if they agree, and so report, in writing, their award shall be binding on the respective parties. But in case of disagreement, the judge of the judicial district court in which the said water works are situated, shall appoint as umpires, five disinterested individuals as above, whose decision and award in writing, reported to the judicial district court aforesaid, shall be binding and conclusive. And the amount so agreed upon shall be payable in the bonds of the mayor and aldermen and inhabitants of New Orleans, bearing an interest of five per centum per annum, interest payable thereon semi-annually, and redeemable in not less than ten, nor more than thirty years from the day on which said award shall be signed, and the said water works delivered over to the said corporation of New Orleans.

SEC. 43. Be it further enacted, etc., That in case the mayor, aldermen and inhabitants of New Orleans shall deem it unadvisable or inexpedient to purchase the said water works from the Commercial Bank of New Orleans, as provided for in sections four and forty-two, and so notify

the Commercial Bank of New Orleans thereof, at any time within eighteen months thereafter, the bonds given by the mayor, aldermen and inhabitants of New Orleans, for the amount of stock owned by the corporation of New Orleans shall be renewed by the Commercial Bank of New Orleans for twenty-five years, on the same terms and conditions as provided for in sections twenty-one and forty-one of this act; provided, however, the amount formed by the sinking fund herein provided shall be applied to the payment of said bonds, as far as it will go, and the bonds only renewed for such balance as may not be made up by the sinking fund aforesaid.

Sec. 44. Be it further enacted, etc., That the corporation of New Orleans shall and may continue to make use of the water works now owned by the said corporation for supplying the city with water, until the Commercial Bank of New Orleans shall be so far advanced with the works contemplated by this act as will enable them to furnish water in such parts of the city as are now supplied by the works at present in operation, or until, by the progress of the water works so to be constructed, it may become necessary to remove the pipes at present in use, should such removal be found necessary.

Sec. 45. Be it further enacted, etc., That the said company, in constructing the water works aforesaid, shall purchase from the mayor, aldermen and inhabitants of New Orleans the pipes already laid down by such corporation, at such price as may be agreed upon by seven arbitrators, of whom the superintendent of the works proposed to be constructed shall be one, and three to be chosen by the president and directors of the Commercial Bank of New Orleans and three by the city council of New Orleans, whose award as to the value of said pipes, for the use of said company, shall be final.

Sec. 46. Be it further enacted, etc., That it shall be the duty of the said bank to sell to the best advantage the bonds received of the mayor, aldermen and inhabitants of the city of New Orleans for their subscriptions and to contract for

the payment of the interest thereof, at such place or places as the president and directors may deem expedient. Provided, that any additional charge, loss or exchange, or other expenses, consequent upon the sale of the bonds, or payment of such interest in any other place than New Orleans, shall be wholly defrayed by the bank.

SEC. 47. Be it further enacted, etc., That during the first term of thirty days in which the subscription books shall remain open, as provided for in section first, no person shall be allowed to subscribe who is not a citizen of the United States and a resident of this State, of which facts the commissioners shall be the sole judges; and that all subscriptions shall be made in person, or under a notarial power, executed by not more than three persons. Provided, however, this section shall not be so construed as to prevent subscriptions, after the first term of thirty days, either in person or by proxy, should the books be reopened. And that no individual, commercial firm or corporation shall be allowed a greater number of votes than one hundred, for the election of directors of said bank, either by proxy or otherwise, in his, her or their name.

SEC. 48. And be it further enacted, etc., That the president and directors of the Commercial Bank of New Orleans may, at such time as they may deem it expedient, establish agencies at such places as they may think proper, for the purchase of bills of exchange and sale of bank checks; and may appoint such officers as they may think proper for the administration of the same.

(Signed) ALCEE LABRANCHE,
Speaker of the House of Representatives.

(Signed) C. DERBIGNY,
President of the Senate.

Approved April 1, 1833.

(Acts Extra Session 1877, page 51).

No. 33] AN ACT

To enable the City of New Orleans to promote the public health and to afford greater security against fire, by the establishment of a corporation to be called the "New Orleans Waterworks Company;" to authorize the said company to issue bonds for the purpose of extending and improving the said works, and to furnish the inhabitants of New Orleans an adequate supply of pure and wholesome water; to permit the holders of waterworks bonds to convert them into stock, and to provide for the liquidation of the bonded and floating debt of the City of New Orleans.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened,* That a corporation be, and the same is hereby created, to be styled "The New Orleans Waterworks Company," the capital stock whereof shall consist of two millions of dollars, which shall be divided into twenty thousand shares of one hundred dollars each.

SEC. 2. *Be it further enacted, etc.,* That immediately after the organization of the said Waterworks Company, as hereinafter provided, it shall be required to issue to the City of New Orleans, stock to the amount of six hundred and six thousand and six hundred dollars, as full paid, and not subject to assessment; and in addition thereto, one similar share for every one hundred dollars of waterworks bonds which said city may have taken up heretofore and extinguished by payment, exchange or otherwise; and that the residue of said capital stock shall be reserved for the benefit of all holders of waterworks bonds, to the extent of the amount now outstanding, who may elect to avail themselves of the provisions of this act; and the said Waterworks Company shall issue to the said City of New Orleans, to be exchanged with the holders of said bonds, one share of full paid stock not subject to assessment, for each and every one hundred dollars of said waterworks bonds; and the said bonds, as fast as surrendered and exchanged for stock as aforesaid, be cancelled; that for the purpose of

affecting said exchange of outstanding waterworks bonds for stock, as aforesaid, the City of New Orleans shall be entitled to all the certificates for the shares of said stock of said New Orleans Waterworks Company, and shall, by advertisement for six months in two newspapers of the City of New Orleans and two newspapers in the City of New York, give notice that it will exchange said stock at par for said waterworks bonds at par, exclusive of the overdue coupons attached to said bonds, which shall constitute a separate demand against said city; and in case any of the said bondholders shall fail or refuse to avail themselves of this act within one year from the formation of said company, the said City of New Orleans shall not thereafter be required to make said exchange, but may retain the unused shares of stock for its own account and benefit, unless it shall prefer to continue to take up any of said outstanding bonds by exchange as aforesaid.

SEC. 3. *Be it further enacted, etc.*, That the said Waterworks Company shall be organized by the Mayor of the city giving thirty days' notice that he will receive subscriptions of bondholders who may agree to exchange their bonds for stock as aforesaid; and the said city shall at once subscribe for stock to the amount of six hundred and six thousand six hundred dollars, and such further amount as shall equal the par value of any of said waterworks bonds, which shall have been extinguished by said city; and as soon as in addition to the subscription of said city there shall be subscribers for an exchange of said bonds for stock to the extent of five hundred thousand dollars, and the said amount of bonds shall have been actually surrendered to and cancelled by the Administrator of Finance, the said subscribers shall assemble together, on a day to be named by the Mayor, and shall elect a board of directors to consist of seven persons, four of whom shall be designated by the Mayor, and the remaining three shall be elected by said subscribers, other than said city, from amongst themselves; and the persons thus designated and elected shall constitute the first board of directors, and shall continue in office until the first of July, eighteen hundred and seventy-eight,

and the said board shall elect one of their number as president.

SEC. 4. *Be it further enacted, etc.*, That as soon after the election of said board of directors, as the City Council may determine, the Mayor of the city shall transfer, by notarial act, to said New Orleans Waterworks Company the waterworks and all the property appurtenant thereto.

SEC. 5. *Be it further enacted, etc.*, That the said Waterworks Company shall own and possess the privileges acquired by the City of New Orleans from the Commercial Bank; that it shall have for fifty years from the passage of this act the exclusive privilege of supplying the City of New Orleans and its inhabitants with water from the Mississippi river, or any other stream or river, by means of pipes and conduits, and for erecting and constructing any necessary works, or engines, or machines for that purpose; that it may contract for, purchase or lease any land or lots of ground, or the right to pass over and enter the same from time to time as occasion may require, through which it may be necessary to convey the water into said city, or to distribute the same to the inhabitants of said city; and to construct, dig, or cause to be opened, any canals or trenches whatsoever, for the conducting of the water of the rivers from any place or places it may deem fit, and to raise and construct such dykes, mounds, reservoirs, as may be required for securing and carrying a full supply of pure water to said city and its inhabitants; to enter upon and survey such lands as it may think proper, in order to ascertain the best mode of furnishing a supply of water; to lay and place any number of conduits, or pipes, or aqueducts, and to cleanse and repair the same, through or over any of the lands or streets of the City of New Orleans; provided, the same shall not be an obstruction to commerce or free circulation; and also to have and use a common seal and alter the same at pleasure; to ordain and establish by-laws for its government and that of its officers and employees, not repugnant to this act and the constitution of the State and of the United States, or the ordinances of the City of New Orleans.

SEC. 6. *Be it further enacted, etc.*, That on the first Monday of July, eighteen hundred and seventy-eight, and annually thereafter, an election for directors of said company, after ten days' notice of the time and place of holding the same, shall be held, at which election there shall be elected four directors by all the stockholders other than the City of New Orleans; and the Mayor of the city, the Administrator of Waterworks and Public Buildings and the Administrator of Finance of said city, shall be *ex officio* directors of said company; the said city, through its Mayor and Administrators, shall have the right to vote at the election of directors, and at all meetings of said stockholders, in the same manner as any other stockholder. That at all elections and all meetings of stockholders each share of stock shall be entitled to one vote. The directors elected shall serve for one year and shall hold their offices until their successors are appointed; and no failure to elect directors at the time designated shall prevent the board of directors from fixing another day for holding the election; and in case of vacancy in the board of directors occasioned by death, resignation or absence from the State or other cause, the board of directors may fill such vacancy for the remainder of the year.

SEC. 7. *Be it further enacted, etc.*, That the stock owned by said City of New Orleans in said Waterworks Company shall not be liable to seizure for the debts of said city.

SEC. 8. *Be it further enacted, etc.*, That the stock be increased to two millions of dollars, for the works; *provided*, that the new or increased stock shall be paid for in cash, or in work done for the company; and in case of non-payment of installments on stock subscribed for, the same may be forfeited to the use of said company.

SEC. 9. *Be it further enacted, etc.*, That the board of directors of said company shall have power, in addition to the authority to increase its capital stock, to borrow money, for the purpose of improving and enlarging its works, and increasing the supply of pure water; and to accomplish this purpose the said board of directors are hereby authorized to issue the bonds of the company to an amount not

exceeding two millions of dollars, in such sums, on such terms, and bearing such rates of interest, as said board may determine, and the payment of said bonds, in principal and interest, may be secured by a mortgage of all the property and franchises of said company, including its franchise to be a corporation, and said mortgage may include the property and franchises of said company, acquired or to be acquired, and the registration of said mortgage in the office of the Recorder of Mortgages for the parish of Orleans shall operate on the property and franchises of said company, wheresoever situated, and shall be and continue a valid and subsisting mortgage until the payment of the debt secured by it, without re-inscription; *provided, however*, that no bond shall be issued, or mortgages given, without the consent of the Council of the City of New Orleans, and said bond shall not be sold or disposed of except on such terms as shall be approved by said Council of said city.

SEC. 10. *Be it further enacted, etc.*, That said company shall not declare or pay any dividends except in cash, and then only out of the net semi-annual or annual receipts, after payment of expenses of operation, and the interest on its bonded debt, nor shall any dividends be declared until the contemplated works are completed and in use.

SEC. 11. *Be it further enacted, etc.*, That the City of New Orleans shall be allowed to use water from the pipes and plugs of said company now laid, or hereafter to be laid, free of any charge, for the extinguishment of fires, cleansing of the streets, and for the use of all public buildings, public markets and charitable institutions, and that the said company shall place, free of any charge whatever, two hydrants of the most approved construction in front of each square, where a main pipe shall be laid at a suitable distance from each other, from which a sufficient quantity of water may be conveniently drawn for the extinguishment of fires, for watering the streets and cleansing the gutters, and for any other public purpose; that on the squares which do not front on the river the hydrants shall be placed on opposite sides of the streets, at an equal distance from each other

and the corners. It shall be the duty of the said company, whenever main pipes shall be laid, to supply water for all the purposes herein mentioned at all times during the continuance of this charter; and in consideration thereof the franchises and property of said New Orleans Waterworks Company, used in accordance with this act, shall be exempt from taxation—State, municipal and parochial.

Sec. 12. *Be it further enacted, etc.*, That the said Waterworks Company shall have the right in the City of New Orleans and its suburbs and adjoining lands, to use the streets and public places for the purpose of laying pipes and hydrants to run water; *provided*, that said streets shall not be obstructed longer than necessary for such purpose, or for making repairs, and that said streets shall be restored to the same condition they were in as soon as practicable, by the said company, under the supervision of the City Surveyor. In case the said Waterworks Company shall require any lot of ground in the City of New Orleans, or any lot of ground or quantity of land situated in any parish of this State, for the purpose of constructing reservoirs or other works or for the purpose of laying pipes to conduct water to the City of New Orleans, and shall not be able to agree with the proprietor or proprietors of said lot of ground or land, the said company shall have power to cause the same to be expropriated in pursuance of the general laws on the subject of expropriation for works of public utility now in force, or which may hereafter be enacted, and if the object of said company be merely to lay pipes through a piece of land, or lot of ground, the expropriation shall be confined merely to the servitude it may require and not to the right of absolute ownership.

Sec. 13. *Be it further enacted, etc.*, That the said Waterworks Company, immediately after its organization, shall proceed to the erection of new works and pipes sufficient in capacity to furnish a full and adequate supply of water, to be drawn from the Mississippi river, or elsewhere, as may be judged most expedient; that said new works and pipes shall be commenced within twelve months from the passage of this act, and shall be year by year completed, so that,

within five years from the date of this act, they shall be completed so as to give an adequate supply of water to the people of the City of New Orleans exclusive of the Fifth District. If said work be not done, as above prescribed, said corporation shall forfeit all exclusive privileges granted herein, and the city shall have a right to contract with anyone else for a supply of water as above provided, and to expropriate the property of the corporation hereby created. After the completion of the new works and pipes, the said company shall, from time to time, as the wants of the population may require, and when the estimated revenue on the cost of such extension shall equal ten per centum, extend their works throughout the entire limits of the city and suburbs, and any future extension of said city; and any failure by said Waterworks Company to comply with this provision shall work a forfeiture of this charter.

SEC. 14. *Be it further enacted, etc.*, That the City of New Orleans, through its Council, shall have authority to apply the stock subscribed for by said city, as herein provided, to the reduction of the bonded or floating debt of the said city, on such terms of adjustment as may be mutually agreed upon between the City Council and the holders of such bonded or floating debt; *provided*, said stock shall not be sold at less than par, and that when sold for obligations of the city it shall only be under sealed proposals, after not less than fifteen days' advertisement in two daily papers, to the bidder who shall offer said obligation at the most advantageous rate, the Council reserving the right to reject any and all bids.

SEC. 15. *Be it further enacted, etc.*, That said Waterworks Company shall have the right to fix the rates of charges for water; *provided*, that the net profits of the company shall not exceed ten per cent. per annum, and shall publish sworn annual statements of its business and condition; and that the City Council shall have the power to appoint a committee of not less than five, who shall have access to the books of the said company and make such extracts from the same as they may be necessary, and in case the said

profit shall exceed ten per cent., the City Council shall have the right to require said company to reduce the price of water in such manner, and in such a proportion, that the profits shall never exceed the above named rates; *and provided, further*, that the rates charged shall never exceed those now paid by the city, and in case said company shall refuse compliance, the demand of said city may be enforced by a writ of mandamus.

SEC. 16. *Be it further enacted, etc.*, That if any person or persons shall obstruct the said company, their successors, agents, workmen or servants, in conveying the said water into the said city and its suburbs, or shall change, alter, remove, injure or destroy any work or part of any work made by the said company, or cause to be made for the purpose of introducing water into the City of New Orleans, under the authority of this act; or if any person shall alter, change or pollute the water or stream which the said company shall hereafter introduce, or be preparing to introduce, such person or persons shall be indicted in the proper court for the trial of such offense, and being thereof convicted, shall be fined at the discretion of the court, according to the nature of the offense, and imprisonment for a term not exceeding seven years, such fine to be paid and applied to the use of said company.

SEC. 17. *Be it further enacted, etc.*, That until other works are constructed by which the present works may be dispensed with, the same shall remain under the control of the City Council, and the superintendence thereof remain in the hands of the Administrator of Waterworks and Public Buildings; but the said company shall be authorized to collect the revenues thereof and apply them to the expense of operating and extending the works. At the expiration of fifty years from the organization of the company, the city shall have a right to buy the works, conduits, pipes, etc., of the company, at a valuation to be fixed by experts; two to be named by the city, two by the company, and the four to select the fifth expert; but should the city neglect or refuse to purchase said works, etc., as above provided, the

charter of the company shall be *ipso facto* extended for fifty years longer, but without any exclusive privilege or right to supply water, according to the provisions of the charter.

SEC. 18. *Be it further enacted, etc.*, That nothing in this act shall be so construed as to prevent the City Council, from granting to any person or persons, contiguous to the river, the privilege of laying pipes to the river, exclusively for his own or their own use.

(Signed) LOUIS BUSH,
Speaker of the House of Representatives.
(Signed) LOUIS A. WILTZ,
Lieutenant Governor and President of the Senate.

Approved March 31, 1877.

(Signed) FRANCIS T. NICHOLLS,
Governor of the State of Louisiana.

A true copy:
WILL A. STRONG,
Secretary of State.

(Acts 1878, page 70).

No. 43] AN ACT

Relative to the Charter of New Orleans Waterworks Company and amending an Act, number Thirty-three of Extra Session of eighteen hundred and seventy-seven (1877), approved March 31, 1877.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened*, That at the election to be held on the first Monday of July, eighteen hundred and seventy-eight (1878) and annually thereafter, for directors of the New Orleans Waterworks Company, the stockholders of the said New Orleans Waterworks Company shall elect four directors, but the City of New Orleans shall not vote at said elections, she being already fully represented for the amount of her stock by the Mayor of the city, the Administrator of Waterworks and Public Buildings, and by the Administrator of Finance, who are *ex officio* directors of said company.

SEC. 2. *Be it further enacted, etc.*, That section ten (10) of said Act number thirty-three (No. 33) of extra session of the year eighteen hundred and seventy-seven (1877) be amended and re-enacted so as to read as follows: "That said company shall not declare or pay any dividends except in cash, and then only out of the net semi-annual or annual receipts after payment of expenses of operation, and gradual extension, and the interest on its bonded debt."

SEC. 3. *Be it further enacted, etc.*, That section seventeen (17) of aforesaid Act be amended and re-enacted so as to read as follows: "That at the expiration of fifty years from the organization of the company, the city shall have a right to buy the works, conduits, pipes, etc., of the company, at a valuation to be fixed by five experts; two to be named by the city, two by the company, and the four to select the fifth expert; but should the city neglect or refuse to purchase said works, etc., as above provided, the charter of the company shall be, *ipso facto*, extended for fifty years longer, but without any exclusive privilege or right to supply water according to the provisions of the charter."

SEC. 4. *Be it further enacted, etc.*, That the time allowed to the said New Orleans Waterworks Company to commence and proceed to the erection of new works and pipes "as contemplated by said Act number thirty-three" (No. 33), shall commence six months after the organization of said company, and not from the date of the passage of said Act.

SEC. 5. *Be it further enacted, etc.*, That the full, complete, and adequate supply of water referred to in section thirteen of said Act No. 33, shall be so construed as to require a supply of water at the height of not less than fifteen (15) feet from the ground wherever the pipes of the Waterworks now exist.

SEC. 6. *Be it further enacted, etc.*, That the word "State" in section eleven of said Act No. 33 of 1877, and in the last line thereof, be stricken out, so that the said company shall not be exempt from State taxation.

SEC. 7. *Be it further enacted, etc.*, That all laws or parts of laws contrary to the provisions of this Act, or in conflict

therewith, are hereby repealed to the extent that they do conflict, and that this Act shall take effect from and after its passage.

(Signed) LOUIS BUSH,
Speaker of the House of Representatives.
(Signed) LOUIS A. WILTZ,
Lieutenant Governor and President of the Senate.
Approved February 26, 1878.
(Signed) FRANCIS T. NICHOLLS,
Governor of the State of Louisiana.

A true copy:
WILL. A. STRONG,
Secretary of State.

(Acts 1884, page 78).

No. 56] AN ACT

To provide for the supply of water to the City of New Orleans, by the New Orleans Water Works Company, in cases of the municipal taxation of said company; to authorize provisions to be made for the payment of water supplied and to be supplied; to provide for obtaining a supply of clear or filtered water by the New Orleans Water Works Company, and to enable the City of New Orleans to contract for the same; to regulate the payment of taxes imposed on said company contrary to the exemption given in its charter and to put into effect Section 11 of Act No. 33 of Acts of 1877, E. S., in instances of refusing or contrary to the exemption therein.

Whereas, Due notice and advertisement has been given and made of the intention to apply for this Act pursuant to Article 48 of the Constitution of this State; and

Whereas, The New Orleans Waterworks Company is being subjected to municipal taxation notwithstanding the exemption from taxation granted by its charter in consideration of water to be supplied to the City of New Orleans; and

Whereas, It is possible and desirable to furnish the in-

habitants of New Orleans with clear or filtered water from the Mississippi river; therefore,

SECTION 1. *Be it enacted by the General Assembly of the State of Louisiana*, That in all instances of the taxation of the franchises or property of the New Orleans Water-works Company for any year or years by or for the City of New Orleans, or for municipal purposes, whether such taxation be for past or future years, and the said company be in any manner obliged to pay, notwithstanding the exemption granted in Section 11 of Act No. 33 of Acts of 1877, E. S., then, in all such instances, the said City of New Orleans is hereby empowered and required to pay the said company the value of all the water the said company has supplied or shall supply during any year or years, for which said taxes have been or shall be levied, to or for the use and purposes of the City of New Orleans, its public buildings, markets, or for streets, gutters, extinguishment of fires or other public purposes.

SEC. 2. *Be it further enacted, etc.*, That in all instances of such taxation, contrary to said exemption, or any future year or years, the City of New Orleans shall provide in its budget, or shall set apart and appropriate a sum sufficient to pay for the said water supply for said year or years; and unless this be observed and done, the said company shall not be compelled to deliver water for the uses and purposes aforesaid.

SEC. 3. *Be it further enacted, etc.*, That any taxes already imposed for any year, contrary to said exemptions, shall not be exacted nor any penalty or interest accrued be demanded thereon, or any begin to run until said city shall have provided for the payment of the water supplied in said year, or provision made therefor by remedy at law or equity.

SEC. 4. *Be it further enacted, etc.*, That to secure the inhabitants of New Orleans and to the use of the city a supply of filtered or clear water, the city of New Orleans be and is hereby empowered to contract with the said company, and determine upon terms and conditions, and fix a price

for obtaining from said company such supply of clear or filtered water.

SEC. 5. *Be it further enacted, etc.*, That nothing in this act shall be construed as in any manner abridging or otherwise affecting any of the rights, franchises and privileges heretofore granted to said company; but all such rights, franchises and privileges shall continue and belong to said company.

SEC. 6. *Be it further enacted, etc.*, That all laws or parts of laws inconsistent herewith, be and are hereby repealed, and this act shall have effect from and after its promulgation.

H. W. OGDEN,
Speaker of the House of Representatives.
CLAY KNOBLOCH,
Lieutenant Governor and President of the Senate.

Approved 7th July, 1884.

S. D. McENERY,
Governor of the State of Louisiana.

A true copy from the original:
OSCAR ARROYO,
Secretary of State.

Act No. 150] CONCURRENT RESOLUTION.

WHEREAS, The majority and minority report of the Joint Committee of the House and Senate, appointed to investigate the affairs, administration and condition of the New Orleans Water Works Company, have been submitted to the General Assembly, together with the testimony and evidence adduced at the various sessions of the said Committee; and,

WHEREAS, The subject matter of the said reports involves the consideration and determination of intricate questions of law and fact; and,

WHEREAS, It is impossible, in view of the limited time at its disposal, for the General Assembly to give the matter the examination and consideration necessary for a proper determination thereof,

Be it, therefore, resolved by the Senate, the House of Representatives concurring, That the whole subject matter of the said report, together with the testimony and evidence upon which they are based, be respectfully referred to the Attorney General of the State for such action in the premises as he may deem proper.

S. P. HENRY,
Speaker of the House of Representatives.
R. H. SNYDER,
Lieutenant Governor and President of the Senate.

Approved July 14th, 1898.

MURPHY J. FOSTER,
Governor of the State of Louisiana.

A true copy:
EUGENE J. McGIVNEY,
Assistant Secretary of State.

(Extracts from the Civil Code of the State of Louisiana, adopted 1870).

I.

BOOK III, TITLE III, CHAPTER 3, SECTION 3.
OF THE OBLIGATIONS TO DO, OR NOT TO DO.

ART. 1926. On the breach of any obligation to do or not to do, the obligee is entitled either to damages, or, in cases which permit it, to a specific performance of the contract, at his option, or he may require the dissolution of the contract, and in all these cases damages may be given where they have accrued, according to the rules established in the following section.

ART. 1927. In ordinary cases, the breach of such a contract entitles the party aggrieved only to damages, but where this would be an inadequate compensation, and the party has the power of performing the contract, he may be constrained to a specific performance by means prescribed in the laws which regulate the practice of the courts.

ART. 1928. The obligee may require that any thing which has been done in violation of a contract, may be undone, if the nature of the cause will permit, and that things be restored to the situation in which they were be-

fore the act complained of was done, and the court may order this to be effected by its officers, or authorize the injured party to do it himself at the expense of the other and may also add damages, if the justice of the case require it.

ART. 1929. If the obligation be not to do, the obligee may also demand that the obligor be restrained from doing anything in contravention of it, in cases where he proves an attempt to do the act covenanted against.

II.

BOOK III, TITLE IV, CHAPTER IV, SECTION 3, PARAGRAPH 3.

OF THE RESOLUTORY CONDITION.

ART. 2045. The dissolving condition is that which, when accomplished, operates the revocation of the obligation, placing matters in the same state as though the obligation had not existed.

It does not suspend the execution of the obligation; it only obliges the creditor to restore what he has received, in case the event provided for in the condition takes place.

ART. 2046. A resolutory condition is implied to all commutative contracts, to take effect in case either of the parties do not comply with his engagements; in this case the contract is not dissolved of right; the party complaining of a breach of the contract may either sue for its dissolution, with damages, or, if the circumstances of the case permit, demand a specific performance.

ART. 2047. In all cases the dissolution of a contract may be demanded by suit or by exception; and when the resolutory condition is an event, not depending on the will of either party, the contract is dissolved of right; but, in other cases, it must be sued for, and the party in default may, according to circumstances, have a further time allowed for the performance of the condition.

III.

BOOK III, TITLE VII.

OF SALE.

ART. 2561. If the buyer does not pay the price, the seller may sue for the dissolution of the sale.